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# Human rights and transnational corporations and other business enterprises

## Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, submitted pursuant to Human Rights Council resolution 17/4.

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# Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises

*Summary*

The present report explores the challenges faced in addressing the adverse impacts of business-related activities on the rights of indigenous peoples through the lens of the United Nations Guiding Principles on Business and Human Rights. The focus is on how the Guiding Principles can bring clarity to the roles and responsibilities of States, business enterprises and indigenous peoples when addressing these impacts. It identifies gaps in implementation and challenges with regard to the State duty to protect against business-related human rights abuses, the corporate responsibility to respect human rights and the corresponding obligations relating to access to effective remedy. Lastly, the Working Group makes recommendations to States, business enterprises and indigenous peoples for the effective operationalization of the Guiding Principles with regard to the rights of indigenous peoples.

# I. Introduction

1. The issue of business-related impacts on the rights of indigenous peoples has been addressed by a number of United Nations mechanisms, including the treaty bodies,[1] the Expert Mechanism on Indigenous Peoples (see A/HRC/EMRIP/2012/CRP.1 and A/HRC/21/55) and the Special Rapporteur on the rights of indigenous peoples (see A/HRC/24/41 and A/HRC/FBHR/2012/CRP.1). Such studies have highlighted the specific features of indigenous cultures, namely their deeply rooted spiritual and cultural special relationship to lands, territories and resources which indigenous peoples traditionally occupy or use. They have noted their overall social and economic marginalization, which limits their ability to successfully assert their rights. It has also been documented that indigenous peoples are among the groups most severely affected by the activities of the extractive, agro-industrial and energy sectors.[2] Reported adverse impacts range from impacts on the right of indigenous peoples to maintain their chosen traditional way of life,[3] with their distinct cultural identity[4] to discrimination in employment and access to goods and services (including financial services), access to land and security of land tenure (see A/65/281), to displacement through forced or economic resettlement and associated serious abuses of civil and political rights, including impacts on human rights defenders (see A/HRC/19/55), the right to life and bodily integrity.[5]

2. As indigenous peoples face a heightened risk of overall social and economic marginalization, some are even more vulnerable to human rights abuses connected to business activities and are excluded from agreement processes and other consultations that irrevocably influence their lives. Those abuses include indigenous women being described as third class citizens and often subjected to multiple forms of discrimination based on gender and ethnicity (see, among others, E/2004/43-E/C.19/2004/23, para. 3, and E/C.19/2012/3). While economic development may offer opportunities for indigenous women, it can deprive them of their existing livelihood, increase their vulnerability to abuse and violence and

[1] Committee on Economic, Social and Cultural Rights, general comments No. 7 (1997) on the right to adequate housing (art. 11.1 of the Covenant): forced evictions, para. 10, and No. 15 (2002) on the right to water, paras. 7 and 16; Committee on the Rights of the Child, general comments No. 11 (2009) on indigenous children and their rights under the Convention, para. 16, and No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights.

[2] See A/HRC/18/35; A/HRC/22/43; A/HRC/FBHR/2012/4; and Cathal Doyle and Jill Cariño, "Making free prior & informed consent a reality: indigenous peoples and the extractive sector" (Philippine Indigenous Peoples Links, Middlesex University School of Law, Ecumenical Council for Corporate Responsibility, 2013).

[3] See E/CN.4/2006/97, para. 25; and Rights and Resources Initiative, "Impact of the extractive industry on the collective land and forest rights of peoples and communities: a summary", available from www.rightsandresources.org/documents/files/doc_5915.pdf.

[4] See, for example, Human Rights Committee, communication No. 511/1992, *Länsman and others v. Finland*, views adopted on 26 October 1994; and *Saramaka People v. Suriname*, judgment of the Inter-American Court of Human Rights, 12 August 2008.

[5] See Inter-American Commission on Human Rights, *Second Report on the Situation of Human Rights Defenders in the Americas* (Washington, D.C., 2011); and A/HRC/16/51/Add.3, para. 34.

undermine their social status.[6] Further groups at risk of multiple discrimination include indigenous children, older persons, young people, people with disabilities and lesbian, gay, bisexual and transgender people.

3. In addition, indigenous peoples feel the cumulative effect of vulnerabilities that individually affect other groups who face increased risk of human rights violations, such as peasants, seasonal workers, the landless and ethnic minorities. They are often the target of racial discrimination, are politically and economically marginalized, lack formal title over their land and are often excluded from the regular labour market. Indigenous women often suffer specific forms of discrimination or abuse, such as sexual violence.

## II. United Nations Guiding Principles on Business and Human Rights

4. In its resolution 17/4, the Human Rights Council unanimously endorsed the Guiding Principles on Business and Human Rights, the first comprehensive global standard on business and human rights, which have received widespread political support (see A/HRC/17/31, annex).

5. Within its mandate to give special attention to persons living in vulnerable situations (see resolution 17/4, para. 6 (f)), the Working Group decided to highlight the impact of business operations on the rights of indigenous peoples and to demonstrate the value of using the Guiding Principles in that specific context. The Working Group held an open consultation during its fourth session and received a number of submissions and suggestions from all stakeholders (see A/HRC/WG.12/4/1). Particular attention was paid to exchange and dialogue with indigenous peoples and their organizations and the views of the business community and individual business representatives were sought through meetings and workshops at various international forums. Reports produced by United Nations bodies mandated to protect the rights of indigenous peoples were examined as primary sources of interpretation and application of those rights. The Working Group wishes to express its sincere appreciation to all those who engaged with it throughout the development of the present report.

## III. State duty to protect the rights of indigenous peoples

6. The commentary to Guiding Principle 1 reaffirms that States as parties to international human rights treaties are the principal bearers of human rights obligations and that they have a duty to respect, protect and fulfil the human rights of individuals within their territory and/or jurisdiction. The duty to protect implies that States must take measures to prevent or end infringement upon the enjoyment of a given human right caused by third parties. In the context of the rights of indigenous peoples, such third parties are often business enterprises.

[6] The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism notes that the use of counter-terrorism laws to suppress indigenous groups' claims for economic, social and cultural rights has particular adverse impacts for women within those communities, including in some instances, killings of indigenous women leaders (see A/64/211, para. 28).

7. The duty to protect is derived from existing human rights obligations or commitments that States have undertaken and that are widely recognized by the international community. The most significant international instruments in the field of the rights of indigenous peoples are the United Nations Declaration on the Rights of Indigenous Peoples and International Labour Organization (ILO) Convention No. 169 (1989) concerning Indigenous and Tribal Peoples in Independent Countries.[7] Significant progress has been made in recent years and the rights of indigenous peoples to lands have been constitutionally or legally acknowledged.[8] Nonetheless, indigenous peoples continue to face many obstacles to the full enjoyment of their rights, beyond the limitations on rights as are prescribed by law and necessary to protect the rights and freedoms of others and in the interests, for example, of national security, public safety and public order.[9] In some countries, legislation concerning indigenous peoples or human rights is inconsistent with other sectoral laws, in particular those relating to mining or natural resource exploitation, which often fail to include provisions ensuring respect for the traditional ownership rights of indigenous peoples. Lastly, the gap in implementation between advances in the legislation and the current administrative, political or juridical practice of States remains of concern, in particular with regard to land programmes (see E/CN.4/2006/78).

8. The State duty to protect against human rights abuse by third parties is a standard of conduct. States are not therefore per se responsible for abuse of the rights of indigenous peoples by private actors. States may, however, breach the duty to protect where such abuse can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish and redress abuse by private actors.[10] States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations and, among other measures, should provide effective guidance to business enterprises on how to do so.[11] As noted in the commentary to Guiding Principle 3, States should consider a smart mix of measures to foster business respect for human rights. A basic measure could be the requirement that business operations specifically and effectively consider the risks of affecting the rights of indigenous peoples and provide guidance to this end.

## A. Free, prior and informed consent and the State duty to protect

9. Free, prior and informed consent is a fundamental element of the rights of indigenous peoples, on which rests the ability to exercise and enjoy a number of other rights. States have an obligation to consult and cooperate in good faith in order

[7] See also ILO Convention No. 107 (1957) concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries.

[8] Constitution of Nicaragua; *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-American Court of Human Rights, judgment of 31 August 2001, para. 151; *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, African Commission on Human and People's Rights, 276/2003 (4 February 2010), para. 209.

[9] Limitations are expressed in various forms in international human rights laws and are themselves interpreted restrictively.

[10] See the commentary to Guiding Principle 1.

[11] Guiding Principles 2 and 3 (c). See Guiding Principle 7 with regard to State support in conflict-affected areas.

to obtain free, prior and informed consent before the adoption of legislation or administrative policies that affect indigenous peoples (art. 19 of the United Nations Declaration on the Rights of Indigenous Peoples) and the undertaking of projects that affect the rights of indigenous peoples to land, territory and resources, including mining and other utilization or exploitation of resources (arts. 19 and 32 of the Declaration). In some circumstances, there is an obligation to obtain the consent of the indigenous peoples concerned, beyond the general obligation to have consent as the objective of consultation (arts. 10 and 29 of the Declaration).

10. The Declaration ties the enjoyment of many rights that are specific to indigenous peoples to the requirement of seeking to obtain free, prior and informed consent, including the rights to land, culture, development and subsistence, which are often affected by business. Free, prior and informed consent is thus both an indicator of whether the State duty to protect has been observed and an instrument to prevent any adverse impact on human rights. For indigenous peoples, free prior and informed consent is an expression of their right to self-determination and, consequently, to control their own territories, resources and destinies. As such, any free, prior and informed consent process should be as far as possible determined and controlled by the indigenous community in question.[12]

11. The components of free, prior and informed consent have generated much research and debate at the national and regional levels[13] and international human rights bodies have provided useful guidance.[14] While free, prior and informed consent does not necessarily require unanimity and may be achieved even when individuals or groups within the community explicitly disagree (e.g. International Finance Corporation Performance Standard 7, para. 12), the alleged difficulty of identifying legitimate representatives of indigenous peoples is of particular importance, as is the definition of consent in the context of indigenous customary institutions. Further challenges lie in applying free, prior and informed consent where it involves customary decision-making processes (e.g. if these exclude a significant proportion of the community, such as women) and knowing whether consent given at the outset of an investment could be subsequently withdrawn. States and business enterprises are advised to seek an open and inclusive dialogue, with attention paid to both men and women, including, where applicable, with national federations and umbrella organizations of indigenous peoples. When such an approach is taken, indigenous peoples will themselves identify their legitimate representatives. Likewise, the indigenous peoples affected should determine autonomously how they define and establish consent, while extra attention must be paid to ensuring that women and other potentially disenfranchised groups are included in the process. Mechanisms and procedures should be established to verify that free, prior and informed consent has been sought. This would also serve to

[12] See Doyle and Cariño, p. 17.

[13] An example at the national level is the El Diquís hydroelectric project in Costa Rica (see A/HRC/18/35/Add.8). At the regional level, the Inter-American Court of Human Rights held, in *Saramaka People v. Suriname*, that, in the context of large-scale development projects within the ancestral territories of indigenous and tribal peoples that had a significant impact on their property rights and on the use and enjoyment of such territories, States had a duty to consult them and to obtain their free, prior, informed consent according to their customs and traditions.

[14] See, for example, A/HRC/18/35/Add.8, A/HRC/12/34, A/HRC/24/41, paras. 26-36; general recommendation No. 23 of the Committee on the Elimination of Racial Discrimination on indigenous peoples; and Human Rights Committee communication No. 1457/2006, *Ángela Poma Poma v. Peru*, views adopted on 27 March 2009.

ensure that businesses enterprises are not seen to create divisions within communities in relation to a proposed activity. For these mechanisms to function properly, indigenous peoples must be included in their development. If it is determined that the elements of free, prior and informed consent have not been respected, it may lead to the revocation of consent given. There may be cases where the legitimacy of community representatives is disputed or where communities do not reach informed consent according to their own decision-making modes. In such cases, additional time and effort from all sides are required and responses should be guided by the principle of free, prior and informed consent that flows from the rights of indigenous peoples and that cannot, where it is required by the Declaration, be replaced by seemingly easier ways to obtain consent.

## B. State-business nexus

12. State-owned or State-controlled corporations appear to be playing an increasing role in business activities that adversely affect indigenous peoples, including in Latin America, Africa and Asia.[15] Many of these enterprises are investing in resource extraction (mining, forestry or oil drilling) or infrastructure projects (dams, roads, pipelines, etc.) that affect indigenous lands and territories.

13. Large State-driven development programmes are often initiated and planned at senior government levels and implemented in close interaction between government bodies and large private or State-owned corporations. In many cases, such programmes affect territories inhabited or used by indigenous communities and carry a high risk of adverse impact on them. When a State assigns strategic importance to the realization of a given project, indigenous communities are at increased risk of political and economic marginalization.

14. In situations in which business enterprises are owned or controlled by the State, or receive substantial support from State agencies, Guiding Principle 4 provides that States should take additional steps to protect against human rights abuses by those business enterprises in order to meet their duty to protect the rights of indigenous peoples. This could be achieved through the development of a comprehensive policy framework before the planning and development of such programmes. Such a framework should, among other things, ensure the full recognition and operationalization of the right of indigenous peoples to self-determination and to participate in decision-making in matters affecting their rights; their right to determine and develop strategies for exercising their right to development and for the development or use of their lands or territories, or other resources, and the principle of free, prior and informed consent that flows from these rights (arts. 23 and 32 of the Declaration). In addition, the framework should establish effective remedy mechanisms, which should be binding on State authorities and private or State-owned enterprises involved (see section V below).

[15] See Przemyslaw Kowalski and others, "State-owned enterprises: trade effects and policy implications", Trade Policy Paper, No. 147 (Paris, OECD, 2013).

### C. Ensuring policy coherence

15. Free trade agreements and bilateral investment agreements entered into by States with the aim of promoting trade and investment have a significant impact on indigenous peoples.[16] Such agreements are reported to have been entered into on many occasions without proper consultation. They often concern investments in extraction of natural resources on indigenous lands and territories, with the risk of adverse impacts on the rights of indigenous communities, affecting livelihoods, culture and the ability of indigenous peoples to decide their own paths to development. In addition, laws enacted and policies implemented further to these agreements can weaken the protection of indigenous lands and resources. In some cases, States have criminalized indigenous protests against such agreements by prosecuting indigenous leaders or by repressing communities that have demonstrated against them (see A/HRC/16/51/Add.3, para. 34).

16. While the aim of free trade agreements and bilateral investment agreements includes increasing economic growth by promoting and protecting international trade and investment, they can weaken the ability of States to regulate domestically and, consequently, restrict their ability to implement international human rights obligations, or to adhere to new obligations or evolving standards.[17]

17. In this regard, Guiding Principle 9 provides that States should maintain adequate domestic policy space to meet their human rights obligations when pursuing investment treaties and contracts. In doing so, States should take into account the specific needs and vulnerabilities of indigenous peoples that are gender sensitive, to avoid restricting their ability to meet their obligations to them. Guiding Principle 8 addresses the need for policy coherence between the business and investment agendas pursued by States and their human rights policies,[18] which is of great relevance to indigenous peoples whose rights are frequently affected by business and investment. States should also refer to the United Nations Conference on Trade and Development investment policy framework for sustainable development[19] and the principles for responsible contracts (A/HRC/17/31/Add.3) for further guidance.

## IV. Corporate responsibility to respect the rights of indigenous peoples

18. Guiding Principle 11 provides that business enterprises have a responsibility to respect human rights, meaning that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they

[16] The number of bilateral and multilateral investment agreements has grown from 300 in 1990 to 3,000 in 2010 (see Anthony Aust, *Handbook of International Law*, 2nd ed. (New York, Cambridge University Press, 2010)).

[17] The well-known risks of stabilization clauses led the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises to encourage States to ensure a new model of trade agreements that "combine robust investor protections with allowances for bona fide public interest measures, including human rights, applied in a non-discriminatory manner" (see A/HRC/14/27, para. 23).

[18] Guiding Principle 10 makes similar points for States acting as members of multinational institutions that deal with business-related issues.

[19] Available from http://unctad.org/en/PublicationsLibrary/webdiaepcb2012d6_en.pdf.

are involved. Guiding Principle 22 stipulates that, where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes. Business enterprises may undertake other commitments, such as ensuring that local communities benefit from employment opportunities, which may contribute to the enjoyment of rights.[20] This does not, however, offset a failure to respect human rights throughout their operations.

19. While business enterprises generally do not have legal obligations directly relating to human rights emanating from international instruments, they will often have legal obligations resulting from State laws that incorporate international standards, or contractual obligations with regard to respecting international standards. Guiding Principle 12 specifies that the responsibility of business enterprises to respect human rights refers to internationally recognized human rights[21] and that business enterprises can affect virtually the entire spectrum of these rights, including the provisions of the International Bill of Human Rights and the principles concerning fundamental rights set out in the ILO Declaration on Fundamental Principles and Rights at Work. Depending on circumstances, business enterprises may need to consider additional standards, such as the Declaration on the Rights of Indigenous Peoples and ILO Convention No. 169, where they may have an adverse impact on the rights of individuals, both men and women, belonging to specific groups or populations that require particular attention, such as indigenous peoples.[22]

20. There is a growing understanding among business enterprises of the need to address the legacy of past wrongs inflicted on indigenous communities as a result of business activities, which can result in additional challenges in seeking to address potential adverse impacts going forward.[23] Engaging in dialogue over legacy issues and developing an understanding of any continued impacts can be an important aspect of building a relationship with indigenous communities that ensures respect for their rights and enables effective implementation of the Guiding Principles.

21. Going forward, and in line with free, prior and informed consent, good faith consultation and participation is crucial, in particular in respect of business decisions that will have a substantial impact on the rights of indigenous peoples, including large "community footprint" projects such as mining, agribusiness and infrastructure. In practice, to avoid adverse impacts as well as business risks, businesses need to ensure that the State-led free, prior and informed consent process is adequate. In the absence of an adequate State-led process, a business enterprise needs to consider carefully whether it can proceed with the project without the risk of causing or contributing to adverse impacts on the right of indigenous peoples. The failure to inform, engage and consult with indigenous peoples, both men

[20] See the impact benefit agreements signed by the Inuit of Nunavik and the Raglan mining company before the development of the Raglan mine. Canadian Centre for Community Renewal, *Aboriginal Mining Guide* (Port Alberni, 2009).

[21] The commentary to Guiding Principle 23 states that, in conflict-affected areas, business enterprises should treat the risk of being complicit in gross human rights abuses committed by other actors (e.g. security forces) as a legal compliance issue.

[22] See the upcoming business reference guide of the Global Compact on the Declaration on the Rights of Indigenous Peoples, available from www.unglobalcompact.org/Issues/human_rights/indigenous_peoples_rights.html.

[23] See Doyle and Cariño, p. 47.

and women, not only undermines the ability of a business enterprise to respect rights (as it may not be aware of its potential or actual impacts), but also fosters mistrust between communities and business enterprises and can lead to the disruption of operations.

## A. Policy commitment

22. Guiding Principle 15 states that, in order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances. As a basis for embedding their responsibility to respect human rights, business enterprises should express their commitment to meeting this responsibility through a high-level public statement, making that commitment a clear, overarching policy that will determine their actions. The policy commitment is distinct from the operational policies and procedures necessary to embed the commitment throughout the business enterprise and that help to translate the high-level commitment into operational terms.[24]

23. Guiding Principle 16 clarifies how this policy commitment should be developed. In the case of potential impacts on indigenous peoples, business enterprises should translate and make the policy commitment easily available to potentially affected indigenous groups, for example through outreach meetings and consultations. In making the policy commitment available and known, business enterprises should take into account differences in language, literacy levels (in particular among women and vulnerable groups) and cultural preferences for the way in which information is transmitted and received. It may be that, in particular circumstances, business enterprises should be further encouraged to include specific provisions on the relationship with indigenous peoples in order to acknowledge the specificities of their situations. In such cases, the clauses should be developed through a participatory process involving indigenous representatives and human rights experts and should be adopted, as with all policy commitments, at the most senior level.

24. A key element of such a policy commitment should be respect for the specific rights of indigenous peoples, in particular respect for collective rights to lands and resources in accordance with their own customary laws, traditions and practices. Any policy commitment specifically referencing indigenous peoples should also lay out principles for engagement with indigenous communities, including good faith consultations, and when and how the business enterprise will seek to ensure respect for the principle of free, prior and informed consent flowing from the rights of indigenous peoples.[25]

25. A number of intergovernmental agencies and international financial institutions have incorporated free, prior and informed consent into their policies and programmes on indigenous peoples. Examples include a strategy for indigenous development and an operational policy on indigenous peoples adopted by the Inter-American Development Bank in 2006 and a guidance note on indigenous peoples adopted by the European Bank for Reconstruction and Development in 2010. In May 2013, the

[24] Office of the United Nations High Commissioner for Human Rights, *The Corporate Responsibility to Respect Human Rights: an Interpretive Guide* (Geneva, 2012), p. 26.

[25] See article 18 of the Declaration on the Rights of Indigenous Peoples and the ruling of the Canadian Supreme Court in *Delgamuukw v. British Columbia*.

International Council on Mining and Metals adopted a policy statement on indigenous peoples, with a commitment to work to obtain the consent of indigenous peoples for new projects (and changes to existing projects) that are located on lands traditionally owned by or under customary use of indigenous peoples and which are likely to have significant adverse impacts on indigenous peoples.[26]

26. Beyond the development of the policy commitment, a review of corporate best practice suggests that the approaches to embedding the commitment into relevant policies and procedures set out below are conducive to the effective implementation of the commitment.

27. First, business enterprises should, through their policy commitment, seek to build a work environment that is culturally aware, gender-sensitive and inclusive and insist on an adequate understanding by employees and contractors of the specificities of indigenous peoples and respect for the rights, cultures and customs of indigenous peoples within the communities in which the projects are located. In this regard, business enterprises should organize specific training as an obligatory part of the contracting procedure.

28. Furthermore, in their policy commitment, business enterprises should recognize that land rights and tenure, including land use and ownership rights based on customary laws, traditions and practices, can be the root of disputes between companies and indigenous peoples. They should identify ways to prevent such disputes and engage in reasonable efforts to prevent them and, if they occur, resolve them through culturally appropriate mediation, using third parties that are trusted by indigenous peoples.

29. With regard to consultation (see article 18 of the Declaration), business enterprises should include in their policy statement a requirement to ensure that information is conveyed in a manner that can be understood by both men and women. Business enterprises need to be aware of the imbalance of power and take specific measures to address this, so that they and the community meet on an equal footing.

## B. Human rights due diligence

30. Guiding Principles 17 to 21 define the parameters for human rights due diligence to be undertaken by business enterprises in order to identify, mitigate and account for how they address adverse human rights impacts. The commentary to the Guiding Principles states that business enterprises should pay special attention to any particular human rights impacts on individuals from groups or populations that may be at heightened risk of vulnerability or marginalization, such as indigenous peoples, and that they should seek to understand the concerns of potentially affected stakeholders by consulting them directly. Guiding Principle 19 states that, to prevent and mitigate adverse human rights impacts, business enterprises should integrate the findings from impact assessments across relevant functions and processes and take appropriate action. This action will vary according to whether the business enterprise causes or contributes to an adverse impact, or whether it is involved solely through a business relationship, and the extent of its leverage in addressing the adverse impact.

[26] Available from www.icmm.com/publications/icmm-position-statement-on-indigenous-peoples-and-mining.

31. Given the specificities of adverse impacts on indigenous peoples, generic environmental, social and health impact assessments may not be sufficient to fully identify and address potential human rights risks, especially with regard to their collective rights to land, resources and self-determination contained in the Declaration (see A/66/288, paras. 93-102). The rights of indigenous peoples can be adversely affected by acts of commission and omission. There may also be unintended consequences that may not be easily identified from standard impact assessments. The requirement of meaningful consultation with indigenous peoples in the human rights due diligence process may therefore be particularly important to enable business enterprises to identify the full range of actual and potential impacts and in particular to identify and address gender-differentiated impacts. Business enterprises should ensure that impact assessment processes provide for an evidence-based and gender-disaggregated review of socio-anthropological issues pertaining to any adverse impacts on indigenous peoples living in areas affected by a project. Furthermore, business enterprises should ensure that impact assessments are sufficiently robust to detect differentiated impacts on possibly vulnerable groups who may sustain greater adverse impacts from the same operation owing to political, economic or social marginalization within the indigenous community.

## V. Access to effective remedy

32. Guiding Principle 25 clarifies that States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that, when business-related human rights abuses occur, those affected have access to effective remedy. This includes considering ways to reduce legal, practical and other relevant barriers, such as those based on gender. Of particular relevance to indigenous peoples are the provisions for remedies included in a number of articles in the Declaration and in ILO Conventions Nos. 169, 29 (1930) on Forced Labour and 111 (1958) on Discrimination (Employment and Occupation). The Inter-American Court of Human Rights[27] has recognized the need for States to ensure access of indigenous peoples to justice in a collective manner, in accordance with their culture. In doing so, it emphasized that judicial remedies that are only available to persons who claim the violation of their individual rights to private property are not adequate or effective to repair alleged violations of the right to communal property of indigenous and tribal peoples and other forms of discrimination that could lead to a denial of access to remedy.[28]

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[27] The Court has affirmed that indigenous peoples have the right to the existence of effective and prompt administrative mechanisms to protect, guarantee and promote their rights over ancestral territories. States must establish administrative procedures to resolve land claims in such a way that these peoples have a real opportunity to recover their lands. Such procedures should be accessible and simple and the mechanisms should be granted the necessary technical and material conditions to provide a timely response to the requests (see *Yakye Axa Indigenous Community v. Paraguay*, Merits, Reparations and Costs. Judgment of 17 June 2005, Series C, No. 125, para. 102).

[28] Inter-American Court of Human Rights, *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations and Costs. Judgment of 28 November 2007, series C, No. 172, para. 179.

## A. State-based judicial mechanisms

33. Guiding Principle 26 provides that States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy. The commentary to the Guiding Principles recognizes that legal barriers to access to remedy could include instances in which certain groups, such as indigenous peoples, are excluded from the same level of legal protection of their human rights that applies to the wider population; and that individuals from groups at heightened risk of vulnerability or marginalization can face additional impediments to using such mechanisms.

34. Additional measures may therefore be required to ensure non-discrimination against indigenous peoples in the judicial sphere through the identification and removal of obstacles to equal access, including in the use of indigenous languages. States should ensure that legal systems recognize indigenous peoples as subjects of international law and take into account the social realities of their specific status. This may require States to allow and require courts to recognize the customary laws, traditions and practices of indigenous peoples and customary ownership over their lands and natural resources in judicial proceedings (see A/HRC/24/50).

## B. State-based non-judicial mechanisms

35. The Guiding Principles recognize that State-based non-judicial mechanisms can play an essential role in complementing and supplementing judicial mechanisms. Even where judicial systems are effective and well-resourced, they cannot carry the burden of addressing all alleged abuses.[29] Non-judicial mechanisms may be more accessible, imply significantly lower costs and pursue a dialogue-oriented approach, potentially allowing for the speedier resolution of a dispute. To ensure their effectiveness, non-judicial mechanisms should meet the criteria in Guiding Principle 31 (namely that they be legitimate, accessible, predictable, equitable, transparent, rights-compatible and a source of continuous learning). While the mechanisms described herein can play an important role for the purposes of accountability, the extent to which they comply fully with the criteria laid down in Guiding Principle 31 should be explored further.

36. National human rights institutions or ombudsman offices have an important role to play in addressing the grievances of indigenous peoples regarding business-related human rights abuses, in particular those relating to the exploitation of natural resources. As with judicial mechanisms, States should consider ways to address any imbalance between the parties to business-related human rights claims and any additional barriers to access faced by indigenous peoples. This could arise when, for example, mechanisms are unable, owing to lack of funding or human resources, to effectively reach out to all those affected across the entire territory of the State, thereby hampering access by indigenous peoples to the mechanism, or where language barriers impede access. The mechanisms should be granted adequate human, financial and technical resources (including training and expertise in business-related impacts) and their capacity to monitor effectively human rights impacts on indigenous peoples, including those arising from business, should be

[29] Commentary to Guiding Principle 27.

increased. They should be mandated to investigate complaints; verify the accuracy of information submitted by the parties, including, where necessary, by undertaking site visits; reach a determination as to whether rights have been violated; and make their decisions public. The mechanisms should be further mandated to make recommendations beyond a particular case, such as encouraging changes in State or corporate policies. They should be mandated to follow up on their decisions and States should carry out awareness-raising campaigns among indigenous peoples for these remedies. Lastly, the mechanisms should be required to take guidance from the Guiding Principles when investigating individual complaints relating to business-related impacts on the rights of indigenous peoples.

## C. Extraterritorial activities of business enterprises

37. The commentary to the Guiding Principles acknowledges that, at present, States are not generally required under international human rights law[30] to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction.[31] Nor are they prohibited from doing so, however. Many States have recognized the strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad and have adopted a number of approaches in this regard. This is particularly important in conflict-affected areas, where the host State may be unable to protect human rights adequately owing to a lack of effective control. Where transnational corporations are involved, their home States have a role to play in assisting those corporations and their host States to ensure that businesses are not involved with human rights abuses.[32] These approaches have sought in part to address the challenges faced by victims in getting access to effective remedy in their home country. As with all grievance mechanisms, States should take into account the specificities of indigenous peoples and ensure that any barriers to their access to the mechanisms are addressed and removed. The commentary to Guiding Principle 26 identifies some of the legal, practical and procedural barriers to access to judicial remedy, which include situations in which claimants face a denial of justice in a host State and cannot gain access to home State courts, regardless of the merits of the claim.

38. The measures that have been adopted range from international agreements, which require States to exercise extraterritorial jurisdiction over corporations,[33]

[30] The Committee on Economic, Social and Cultural Rights, in its general comment No. 15, and the Committee on the Elimination of Racial Discrimination, in concluding observations (CERD/C/CAN/CO/19-20 and CERD/C/NOR/CO/19-20), have called for extraterritorial jurisdiction over business enterprises.

[31] See also the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights.

[32] Commentary to Guiding Principle 7. See also General Principle 3.2 of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (Rome, Food and Agriculture Organization of the United Nations, 2012).

[33] Article 3 of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography; articles 5 (2) and 8 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and article 9 (2) of the International Convention for the Protection of All Persons from Enforced Disappearance.

to national laws and measures with extraterritorial implications[34] to State-based non-judicial mechanisms such as the OECD Guidelines for Multinational Enterprises.

39. The OECD Guidelines are recommendations by Governments covering all major areas of business ethics, including corporate steps to obey the law and observe internationally recognized standards. The Guidelines were updated in 2011 and have a human rights chapter aligned with the Guiding Principles. They are supported by a mechanism of national contact points,[35] established by Governments that adhere to the Guidelines to promote and implement them and assist business enterprises and their stakeholders to take appropriate measures for further observance of them. National contact points provide a mediation and conciliation platform that has been used by indigenous peoples for resolving practical issues that may arise in the implementation of the Guidelines.[36]

40. Currently, companies can voluntarily decide whether to participate in a mediation. Some stakeholders have suggested that national contact points should have further tools at their disposal to encourage companies to engage in mediation in cases brought before them under the "specific instances" procedure and make appropriate recommendations on the implementation of the Guidelines in situations involving indigenous peoples.

## D. Non-State-based grievance mechanisms and grievance mechanisms at the operational level

41. Guiding Principle 28 provides that States should consider ways to facilitate access to effective non-State-based grievance mechanisms dealing with business-related human rights harms. Guiding Principle 29 states that business enterprises should establish or participate in effective grievance mechanisms at the operational level for individuals and communities who may be adversely affected. Given the requirement that access be provided to an effective remedy, the performance of grievance mechanisms at the operational level needs to be appropriately assessed. The development of performance indicators that can be used by stakeholders to encourage the proper functioning of grievance mechanisms is important and can be used by stakeholders to understand how grievance mechanisms at the operational level are working and to hold business enterprises accountable.

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[34] For example, a reporting requirement imposed on the corporate parent with regard to a company's overall human rights impacts, which may include those of its overseas subsidiaries. The Burma Responsible Investment Reporting Requirements requires any United States company investing more than $500,000 in Myanmar to report on its human rights impacts according to the Guiding Principles.

[35] They also include a new provision regarding stakeholder engagement. OECD is exploring the potential for a user guide for stakeholder engagement and the extractive industry under the Guidelines.

[36] See, for example, the complaint brought by Survival International with the national contact point of the United Kingdom of Great Britain and Northern Ireland against Vedanta Resources, a British mining corporation. In its statements, the national contact point confirmed the substance of the allegations and said that Vedanta Resources had acted in breach of the OECD Guidelines. The national contact point recommended that the company should work with the Dongria Kondh people to explore alternatives to resettlement and to include a human rights impact assessment in its project management process. The Supreme Court of India recently issued a ruling in which it effectively banned Vedanta Resources from constructing the mine without the consent of the Dongria Kondh.

42. Experience also suggests that the development of grievance mechanisms cannot be separated from the broader dialogue and engagement with indigenous communities.[37] Such engagement should be based on acknowledgement of the status of indigenous peoples as collective rights holders and, where required by the Declaration, be framed in a free, prior and informed consent process. In this regard, the process itself can provide an important remedial mechanism (see, in particular, articles 28 and 32 of the Declaration). Given the recognition in the Declaration of the specificities of the laws and customs of indigenous peoples, business enterprises should consider identifying adequate and culturally and gender-appropriate remedy mechanisms as an integral part of any contractual relationship with indigenous peoples.

43. The Guiding Principles require that grievance mechanisms at the operational level reflect the criteria in Principle 31 to ensure their effectiveness in practice. Such mechanisms should furthermore be based on engagement and dialogue, implying consultation with the stakeholder groups for whose use they are intended and focusing on dialogue as a means to address and resolve grievances. A grievance mechanism can serve its purpose only if the people it is intended to serve know about it, trust it and are able to use it. In this regard, it is important for grievance mechanisms to be constructed in a gender-sensitive manner.

44. Various initiatives are being undertaken by business enterprises, industry associations and multi-stakeholder groups to further advance good practices. The Working Group recalls its continuing project to build capacity to enhance access to judicial and non-judicial remedy in the area of business and human rights (see A/HRC/23/32, para. 64). The following elements have emerged as good practices for business enterprises in handling grievances from indigenous peoples. Mechanisms should be developed in the context of a consultation process with the indigenous community and specific attention should be paid to ensuring accessibility, responsiveness and local ownership of the mechanism. This can help to ensure that it meets the needs of indigenous peoples, that it will used in practice and that there is a shared interest in ensuring its success. This is particularly important for indigenous peoples, who continue to suffer from power imbalances and where the legitimacy of any grievance mechanism will be crucial. Capacity-building should be undertaken to develop the relevant legal knowledge and skills and the grievance log should be accessible to the parties, ensuring a basic starting principle in favour of transparency, but with due regard for the protection of victims in cases where reprisals or pressure are likely. Lastly, to ensure the independence and legitimacy of grievance mechanisms, any periodic review of the mechanism should incorporate feedback from indigenous communities.

[37] Further to broad protests, Sakhalin Energy Investment Company Ltd. negotiated a development plan for the indigenous peoples of Sakhalin, including a distinct community grievance mechanism to complement its existing grievance mechanism. That was as a result of consultations that noted the specific nature of complaints raised by indigenous peoples, more often relating to environmental harm and impacts on their traditional livelihoods. It also set up a community liaison network, with one person tasked specifically with liaising with indigenous persons, to ensure daily communication with communities, including on grievances. See Natalya Novikova and Emma Wilson, "The Sakhalin-2 project grievance mechanism, Russia", in Emma Wilson and Emma Blackmore, eds. *Dispute or Dialogue? Community Perspectives on Company-led Grievance Mechanisms* (London, International Institute for Environment and Development, March 2013), p. 88.

## E. Customary institutions as non-judicial grievance mechanisms

45. Indigenous peoples have developed a wealth of dispute resolution mechanisms and judicial systems based on their respective customary laws, traditions and practices. While the primary use for indigenous dispute resolution mechanisms is the resolution of disputes and grievances between members of the same community, cases have been documented where such mechanisms have been successfully applied to remedy abuses of the rights of indigenous peoples by business enterprises. Increasingly, international human rights practice and jurisprudence recognize the importance of the customary laws, traditions and practices of indigenous peoples as a remedial instrument. Studies suggest that their use is more efficient in addressing the grievances of indigenous peoples than sole reliance on national legal systems or other non-judicial remedy mechanisms.[38]

46. This approach has often been described as participatory and dialogue-oriented and could prove a useful additional mechanism for business enterprises to build trust with indigenous peoples by recognizing the importance that their customary laws, traditions and practices place on restoring peace and harmonic relations. A settlement based on customary laws, traditions and practices has the potential to ensure sustainable, longer-lasting results acceptable to all involved parties, including business enterprises, which may be less likely to result from a judicial process. Furthermore, customary grievance mechanisms are often significantly easier to gain access to and are free of the costs associated with the judicial system.

47. For indigenous peoples, using customary laws, traditions and practices as a remedy instrument in relation to businesses operating in their territories offers the potential of feeling empowered over their own destiny and fully engaged in decision-making on issues relating to their resources and territories. At the same time, such an approach places a very substantial responsibility on indigenous communities, including ensuring that the mechanism is in conformity with the effectiveness criteria laid out in Guiding Principle 31.

## F. International and regional human rights mechanisms

48. As noted in the commentary to Guiding Principle 28, the complaints procedures provided by the Constitution of ILO,[39] United Nations treaty monitoring bodies[40]

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[38] See Maria Roda L. Cisnero, "Rediscovering olden pathways and vanishing trails to justice and peace: indigenous modes of dispute resolution and indigenous justice systems" in *A Sourcebook on Alternatives to Formal Dispute Resolution Mechanisms* (Philippines, Justice Reform Initiatives Support Project, 2008).

[39] Article 24 of the Constitution of ILO has been used by indigenous peoples in cases of State infringement of their obligations under various articles of Convention No. 169 (including articles 6, 14 and 15) in the context of business activities.

[40] In addition to examples highlighted herein, the Committee on the Elimination of Racial Discrimination has adopted concluding observations in which it has acknowledged racial discrimination against indigenous peoples as a consequence of land policies and extractive industries activities; urged States to adopt policies and legislation to end such discrimination; and noted the need for States to develop consultation and obtain the free, prior and informed consent of indigenous peoples in the case of the exploitation of natural resources on their lands and territories (CERD/C/CHL/CO/15-18; CERD/C/PER/CO/14-17; CERD/C/ARG/CO/19-20; CERD/C/PAN/CO/15-20; CERD/C/RUS/CO/19).

and regional human rights mechanisms are also deemed to be non-State-based grievance mechanisms. In particular, the consideration of individual communications by United Nations treaty bodies has provided an avenue for remedy for indigenous peoples, the challenges that this has created for the treaty bodies notwithstanding. States should raise awareness of, or otherwise facilitate access to, such international and regional monitoring bodies, alongside the mechanisms provided by the State itself.

## G. Accountability mechanisms of multilateral development banks

49. Multilateral development banks provide indigenous peoples with the possibility of gaining access to their accountability mechanisms in order to raise concerns or lodge a complaint about projects supported by the banks that affect them or their environment.[41] These mechanisms have proved to be a means of holding the banks accountable for actions that cause or threaten to cause harm to affected complainants or the environment and for actions that are inconsistent with the banks' own operational policies and procedures,[42] including safeguard policies created for the purpose of preventing harm to indigenous peoples.[43]

## H. Effectiveness of remedy and indigenous peoples

50. Guiding Principle 31 establishes criteria to assess whether a particular judicial or non-judicial remedy can be deemed to be effective.

51. First, to meet the requirement of legitimacy, remedy mechanisms should be set up in such a way as to fully acknowledge the status of indigenous peoples as having the right to full enjoyment, as a collective or individuals, of all human rights and freedoms as recognized in international human rights law and taking into account rights and standards associated with this status. Second, remedy mechanisms should afford due recognition to the role of the customary laws, traditions and practices of indigenous peoples and the authority of their governance institutions, both for substantive and procedural reasons, while ensuring that they respect the rights and freedoms of others. Such recognition should acknowledge that existing internal grievance mechanisms of indigenous peoples may be empowered to address violations occurring within territories under their traditional jurisdiction. In this regard, the Working Group emphasizes that any non-judicial grievance mechanism, including traditional mechanisms of indigenous peoples should be rights-compatible (in process and outcome).

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[41] See Leonardo A. Crippa, "Multilateral development banks and the human rights responsibility", *American University International Law Review*, vol. 25, No. 3 (2010).

[42] See Daniel D. Bradlow, "Private complainants and international organizations: a comparative study of the independent inspection mechanisms in international financial institutions", *Georgetown Journal of International Law*, No. 36 (2005).

[43] The International Finance Corporation created a compliance advisory ombudsman with a compliance, advisory and dispute resolution mandate with regard to its Performance Standards, including Performance Standard 7 on Indigenous Peoples. The Inter-American Development Bank set up an independent consultation and investigation mechanism with a similar mandate and an added "judicial clause" that prohibits admissibility of complaints if they "raise issues under arbitral or judicial review by national, supranational or similar bodies".

52. Furthermore, in line with the requirement of accessibility in Guiding Principle 31, remedy mechanisms should be specifically accessible to indigenous peoples, including both men and women. Accessibility includes their physical accessibility, e.g. the place and timing of proceedings should be chosen in a manner that allows indigenous representatives to be physically present. As indigenous peoples often settle in remote, peripheral regions of their respective States, ensuring physical accessibility of remedy mechanisms often requires special measures. It also includes linguistic, cultural and gender accessibility.

53. More broadly, and although the Guiding Principles do not tackle the issue of the content of the remedy per se, article 28 of the Declaration elaborates what would amount to a rights-compatible outcome of grievance mechanisms for indigenous peoples when their lands have been confiscated, taken, occupied or damaged without their free, prior and informed consent. Article 11 of the Declaration states that indigenous peoples are also entitled to redress with regard to cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent.

# VI. Conclusions and recommendations

## A. Conclusions

54. **The United Nations Guiding Principles on Business and Human Rights provide an authoritative guide for States, business enterprises and indigenous peoples as to how to meet international standards and enhance their practices with regard to preventing and addressing adverse business-related impacts on the human rights of indigenous peoples, so as to achieve tangible results. As highlighted therein, particular attention should be paid throughout to the rights, needs and challenges faced by those at heightened risk of becoming vulnerable or marginalized. This is crucial for indigenous peoples, who are often disproportionately adversely affected by business activities. States and business enterprises should therefore address the rights of indigenous peoples when meeting their respective State duty to protect against human rights abuses and the corporate responsibility to respect human rights. The Working Group urges relevant bodies and stakeholders to conduct further studies into the effectiveness of existing remedy mechanisms available to indigenous peoples, including judicial and non-judicial mechanisms, extraterritorial remedies and indigenous dispute resolution modes, with the goal of developing fact-based comprehensive guidance for States, international institutions, business enterprises and indigenous peoples.**

## B. Recommendations

55. **States should:**

(a) **Consider ratifying ILO Convention No. 169 (1989) concerning Indigenous and Tribal Peoples in Independent Countries and pursue a range of measures to fully implement the United Nations Declaration on the Rights of Indigenous Peoples, in particular for home States of transnational corporations operating in territories used or inhabited by indigenous peoples, even if no indigenous populations reside within their borders;**

**(b) Use the Guiding Principles to clarify the duties and responsibilities of actors in preventing and addressing the human rights impacts of businesses on the rights of indigenous peoples;**

**(c) State the expectation that all business enterprises domiciled in a State territory respect human rights throughout their operations; set expectations and obligations of business enterprises and other actors in addressing business-related impacts on the human rights of indigenous peoples, in particular in conflict-affected areas; encourage business enterprises to communicate and engage on their policies and procedures for addressing their human rights impacts and be accessible to all, including both men and women;**

**(d) Ensure that strengthened monitoring and enforcement mechanisms are put in place to prevent and address any adverse human rights impacts of businesses, including integrating and applying gender-sensitive human rights considerations into relevant national laws, policies, regulations and contracts, such as bilateral investment treaties and agreements with host Governments, and in the granting of concessions for the exploration or extraction of natural resources;**

**(e) Ensure that adequate policy space to meet human rights obligations relating to the rights of indigenous peoples is maintained when pursuing investment treaties or contracts, by taking into account the specific needs and vulnerabilities of indigenous peoples;**

**(f) Ensure that indigenous peoples who are actually or potentially affected by business activities have complete and timely access to all relevant information to ensure that they are able to participate effectively in key decisions that affect them and that meaningful gender-sensitive consultations with indigenous peoples become an essential component of all contracts entered into with international investors;**

**(g) When developing a national action plan for the implementation of the Guiding Principles, consider the particular impacts of business activities on indigenous peoples and the necessary remedy measures;**

**(h) For guidance on investment contracts, refer to the United Nations Conference on Trade and Development investment policy framework for sustainable development and the principles for responsible contracts and integrate the management of human rights risks into State-investor contract negotiations, in particular as relevant to the rights of indigenous peoples;**

**(i) If States members of OECD, ensure that national contact points for the OECD Guidelines for Multinational Enterprises are independent, impartial and fully resourced to address the grievances of indigenous peoples. This includes knowledge of the rights of indigenous peoples including free, prior and informed consent, and familiarity with indigenous modes of decision-making and customary laws, traditions and practices, as well as making appropriate recommendations on implementation of the OECD Guidelines in cases involving indigenous peoples;**

**(j) Home States of multinational enterprises should consider ways to ensure that indigenous peoples affected by the operations of those enterprises abroad have access to effective remedy;**

**(k) Develop a comprehensive policy framework before the planning and development of projects involving business enterprises owned or controlled by the State, or receiving substantial support from State agencies, setting out additional steps to protect the rights of indigenous peoples;**

**(l) Consider ways to ensure that policies and regulations in place enable the effective implementation of the requirements for free, prior and informed consent in the context of business activities;**

**(m) Review and amend existing remedial mechanisms, as appropriate, to ensure alignment with the Guiding Principles and assess their appropriateness and effectiveness for protecting the rights of indigenous peoples;**

**(n) Reinforce the capacity of judges, lawyers and prosecutors to address grievances brought by indigenous peoples relating to business activities and ensure that mandatory training for judges and lawyers covers gender-sensitive international human rights obligations, including standards relating to business and human rights and indigenous peoples;**

**(o) Devote adequate human, financial and technical resources to national human rights institutions and increase their capacity to effectively monitor and tackle impacts on the rights of indigenous peoples;**

**(p) Carry out awareness-raising campaigns, together with relevant stakeholders, to allow indigenous peoples within the State jurisdiction to avail themselves of the legal and non-legal remedies available to assist them;**

**(q) Build the capacity of indigenous peoples to develop their own representative structures, to ensure they are able to participate effectively in key decisions that affect them.**

56. **Business enterprises should:**

**(a) Comply with the responsibility to respect human rights, including by adopting a gender-sensitive human rights policy, carrying out human rights impact assessments with regard to current and planned operations and addressing any adverse human rights impacts that they cause, contribute to or are linked to, including by exercising leverage in business relationships to address adverse impacts and paying particular attention to any operations in the territories and lands of indigenous peoples;**

**(b) Commit themselves to respecting the United Nations Declaration on the Rights of Indigenous Peoples and ILO Convention No. 169 in policy commitments, human rights due diligence processes and remediation processes;**

**(c) Ensure that grievance mechanisms at the operational level reflect the criteria in Guiding Principle 31 and that they are based on gender-sensitive engagement and dialogue, by consulting indigenous peoples and focusing on dialogue as a means to address and resolve grievances;**

**(d) Consult and engage regularly and directly with men and women in the communities in which operations are conducted and inform them as to the way their lifestyles, livelihoods and human rights may be affected, paying due attention to the various methods of informing and consulting that may be required, owing to culture and language, as distinct from the rest of the population;**

**(e) Share experiences broadly with other enterprises within and across sectors in meeting the responsibility to respect the rights of indigenous peoples and encourage all sectors to develop guidance within their industries.**

57. **Indigenous peoples should:**

**(a) Ensure that decision-making protocols with regard to any free, prior and informed consent processes are developed, described and strengthened through their own representative institutions and in accordance with their own procedures and, where possible, codified in a way that brings greater specificity to assist in their application, that such law(s) are understandable and accessible to business enterprises and States and that those processes and laws are fully in conformity with international human rights law;**

**(b) Consider strengthening their institutions, through their own decision-making procedures, in order to set up representative structures, including both men and women, that facilitate the relationship with business activities, in particular in relation to the processes of consultation and of free, prior and informed consent when these activities may have an impact on or directly affect them or their lands and resources, and with those dealing with their right to redress or compensation and/or benefit-sharing from the same activities.**

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Item 69 (a) of the provisional agenda*
**Promotion and protection of human rights: implementation of human rights instruments**

# United Nations Voluntary Trust Fund on Contemporary Forms of Slavery

## Report of the Secretary-General

*Summary*

The present report, which is submitted in accordance with General Assembly resolution 46/122, describes the recommendations for grants to beneficiary organizations that were adopted by the Board of Trustees of the United Nations Voluntary Trust Fund on Contemporary Forms of Slavery at its seventeenth session, held in Geneva from 3 to 7 December 2012. It also provides information on policy decisions adopted by the Board.

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# I. Introduction

## A. Submission of the report

1. The present report was prepared in accordance with the arrangements approved by the General Assembly in its resolution 46/122, by which it established the United Nations Voluntary Trust Fund on Contemporary Forms of Slavery (the Fund). It presents the recommendations for grants adopted by the Board of Trustees of the Fund at its seventeenth session, held in Geneva from 3 to 7 December 2012. The United Nations High Commissioner for Human Rights approved those recommendations on behalf of the Secretary-General on 17 December 2012.

## B. Mandate of the Fund

2. In line with resolution 46/122, the Fund was established in 1991 with the purpose of extending humanitarian, legal and financial aid to individuals whose human rights have been severely violated as a result of contemporary forms of slavery. The Fund receives voluntary contributions from Governments, non-governmental organizations, private or public entities and individuals.

## C. Administration of the Fund and Board of Trustees

3. The Secretary-General administers the Fund through the Office of the United Nations High Commissioner for Human Rights (OHCHR), with the advice of a Board of Trustees and in accordance with the Financial Regulations and Rules of the United Nations.

4. The Board of Trustees is composed of five members with relevant experience in the field of human rights and, in particular, in issues of contemporary forms of slavery. They serve in their personal capacity and are appointed by the Secretary-General with due regard to equitable geographical distribution and in consultation with their Governments. In June 2011, the Secretary-General renewed the mandates of Ms. Virginia Herrera Murillo (Costa Rica) and Ms. Klara Skrivankova (Czech Republic) for a final term ending on 31 December 2013 and appointed Ms. Asma Jahangir (Pakistan), Mr. George Omona (Uganda) and Mr. Michael Beresford Dottridge (United Kingdom of Great Britain and Northern Ireland) as new members for a first term, renewable once, ending on 31 December 2013. At the seventeenth session, Ms. Herrera Murillo was appointed Chair by acclamation for one year.

5. Pursuant to recommendations formulated by the Office of Internal Oversight Services in its audit report on the United Nations Voluntary Fund on Contemporary Forms of Slavery of 2007, as at 1 January 2012, the secretariats of the Fund and the United Nations Voluntary Fund for Victims of Torture were placed within the Human Rights Treaties Division of OHCHR. During the reporting period the joint secretariat has reviewed and aligned the working methods of both funds with a view to heightening cost-effectiveness, pooling expertise and sharing best practices. In addition, the web page of the Fund has been improved.

# II. Management of grants

## A. Admissibility criteria

6. In accordance with the mandate of the Fund, as set out in the General Assembly resolution 46/122, the beneficiaries of assistance from the Fund would include individuals whose human rights have been severely violated as a result of contemporary forms of slavery. Project admissibility criteria are outlined in the Fund's guidelines.

7. The beneficiary organizations are requested to accept all conditions attached to the grant, such as providing additional documents and/or mid-year and final narrative and financial reports on the use of grants by a given deadline. Upon receipt of this confirmation, the secretariat of the Fund requests the financial services of the United Nations Office at Geneva to disburse funds promptly.

8. As at 31 May 2012, the deadline for submitting applications for project grants for 2013, the Fund had received 364 applications. The admissible applications were examined by the Board of Trustees at its seventeenth session, held from 3 to 7 December 2012. The deadline for submitting applications for project grants for 2014 was 8 May 2013. The admissible applications will be examined by the Board of Trustees at its eighteenth session, to be held in Geneva from 18 to 22 November 2013.

## B. Monitoring and evaluation by the Board of Trustees and the secretariat

9. At its seventeenth session, the Board of Trustees expressed appreciation for the increased number of evaluation and monitoring visits to organizations funded by the Fund or to new applicants that had been undertaken by the Fund secretariat, and OHCHR country and regional offices and the human rights components of peacekeeping missions, at times in cooperation with Board members.

10. During the reporting period, the newly established joint secretariat enhanced the methodology for project monitoring evaluation and developed new working tools, including project evaluations and mission report templates.

11. Fifty-five projects were awarded grants for 2013. Project visits were undertaken to 39 of them in 2011 and 2012 by Board of Trustee members, Fund staff, OHCHR country and regional offices and the human rights components of peacekeeping missions, including projects in Albania, Azerbaijan, Bangladesh, Cambodia, Cameroon, Colombia, Costa Rica, Côte d'Ivoire, Democratic Republic of the Congo, France, Haiti, India, Indonesia, Ireland, Israel, Kyrgyzstan, Lebanon, Liberia, Mauritania, Mexico, Nepal, Philippines, Romania, Russian Federation, Senegal, Singapore, South Sudan, Switzerland (for a project in the United Arab Emirates), Thailand, Togo, Uganda, Viet Nam and the Occupied Palestinian Territory. At the time of reporting, 13 project visits had been undertaken in Bulgaria, Cambodia, France, Italy, Lebanon, the Netherlands, the Republic of Moldova and Spain.

## III. Financial situation of the Fund

12. Between 2009 and 2012, annual voluntary contributions to the Fund decreased by 50 per cent, from an all-time high of $886,482 in 2009 to $493,650 in 2012. This is mainly attributed to the ongoing financial crisis, which makes it difficult for the Fund to meet the ever-increasing demands for assistance.

13. At its seventeenth session, the Board of Trustees noted that the Fund was currently working with the minimum level of required resources to fulfil its mandate.

14. The Board of Trustees estimated that the Fund would need at least $1.5 million before its eighteenth session in 2013 to satisfactorily meet the demands for assistance.

15. The table below indicates the contributions and pledges received during the reporting period.

**Contributions and pledges received from 11 July 2012 to 12 July 2013**

| *Donor* | *Amount (United States dollars)* | *Date of receipt* |
|---|---|---|
| *States and other entities* | | |
| Germany | 325 945 | 12 July 2013 |
| India | 24 982 | 7 March 2013 |
| Israel | 5 000 | 19 October 2012 |
| Saudi Arabia | 50 000 | 20 September 2012 |
| South Africa | 5 363 | 7 March 2013 |
| Spain | 5 172 | 2 January 2013 |
| Turkey | 6 000 | 3 December 2012 |
| United Arab Emirates | 31 646 | 25 April 2013 |
| Holy See | 1 000 | 7 February 2013 |
| **Subtotal** | **455 108** | |
| **Private/public entities** | | |
| Ambassadors, European Union | 1 258 | 25 April 2013 |
| Individuals | 646 | 21 November 2012 |
| **Subtotal** | **1 904** | |
| **Total, as at 12 July 2013** | **457 012** | |

## IV. Seventeenth session of the Board of Trustees

16. The seventeenth session of the Board of Trustees of the Fund was held in Geneva from 3 to 7 December 2012.

17. The session was the first one serviced by the newly established secretariat of the Human Rights Treaties Division. A common understanding was reached between the Board of Trustees and the secretariat on a number of key management and policy

issues, including the alignment of the grant implementation cycle with the United Nations financial year. The Board agreed on a new methodology concerning the pre-screening process, providing for three levels of funding recommendations (highly recommended, recommended and not recommended), in order to enhance the in-session selection of project proposals. It also decided that all applications for 2013 would have to be submitted through an online grant management system.

18. The Board of Trustees also undertook a complete revision of the Fund's guidelines including a clearer victim-oriented definition of the objectives and principles of the Fund and a clearer outline of admissibility. The revised guidelines also outline in clear terms the grant cycle, the verification methodology and the new online grant management system of the Fund.

## A. Recommendations adopted by the Board of Trustees

19. The Board of Trustees examined 173 admissible applications for project grants, amounting to approximately $2,304,745, which had been evaluated and scored by the secretariat in preparation of the session. The Board decided to focus its review on 69 projects that were highly recommended for funding and decided to recommend 55 of them, for a total amount of $607,500. The projects will assist non-governmental organizations in 44 countries in the five regions of the world, as follows: Asia-Pacific States (24); African States (12); Eastern European States (6); Latin American and the Caribbean States (7); and Western Europe and other States (6). The projects address a variety of forms of contemporary forms of slavery, including forced recruitment of children in armed conflict, domestic servitude, forced and early marriage, bonded labour, trafficking for labour and sexual exploitation.

20. Figures I and II below illustrate the breakdown of the 55 approved grants, by region and by type of contemporary slavery.

Figure I
**Grants awarded by region in 2013**

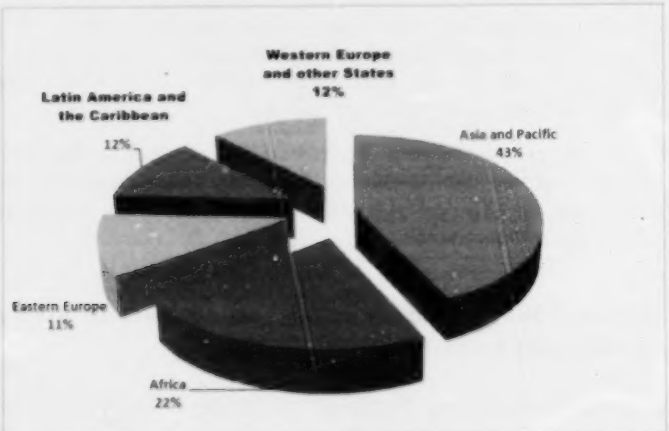
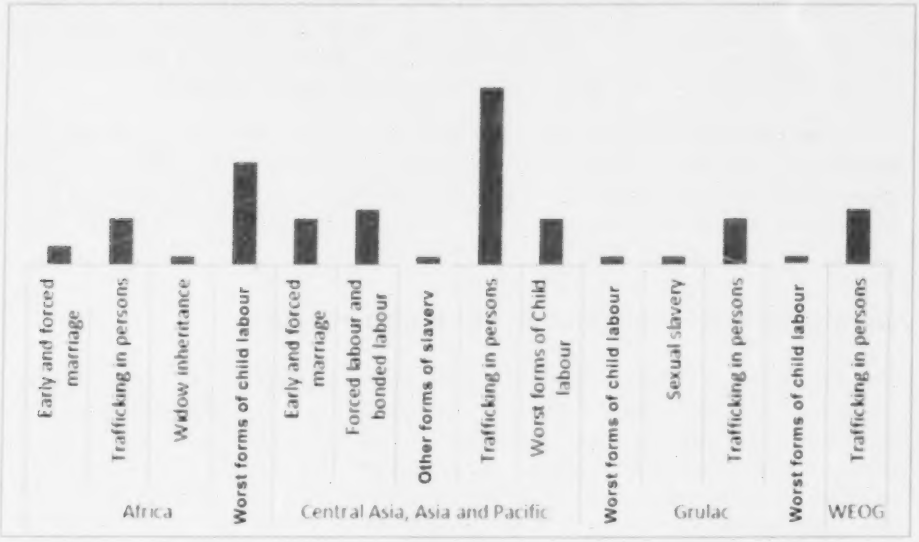


Figure II
**Breakdown of contemporary forms of slavery by region**




## B. Policy decisions

21. The Board of Trustees recommended that projects be selected based on the quality of the project, geographical distribution, type of assistance provided and gender balance. It reiterated the need to prioritize projects in accordance with a strategy that addresses the root cause of the problem, combined with direct assistance and income-generating activities that assist the victims of contemporary forms of slavery.

22. The Board of Trustees endorsed maintaining a one-year funding policy. Subject to funding availability, organizations can receive funding for up to five consecutive years, after which a break of at least one year is required. Of the 55 project grants approved at the seventeenth session, 23 were approved for organizations that had previously received funding.

23. Within the context of the joint secretariat and subject to the availability of funding, it is expected that United Nations Voluntary Trust Fund on Contemporary Forms of Slavery and the United Nations Voluntary Fund for Victims of Torture will each finance a fellowship in 2014.

## C. Cooperation and developments in the United Nations system concerning relevant mandates

24. At its seventeenth session, the Board of Trustees held a dialogue with the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, Gulnara Shahinian. The Special Rapporteur updated the Board on developments relating to her mandate, including the challenges faced and

advancements made during her missions to several countries. The Special Rapporteur and the Board reaffirmed their commitment to collaborating with each other regarding the dissemination of information and support for country missions.

25. Pursuant to the commitment to cooperate with the Special Rapporteur, the Board supplied information on projects providing assistance to victims of contemporary forms of slavery in countries visited by the Special Rapporteur while maintaining the necessary level of confidentiality. Information was also provided on organizations that continued to or had previously received support from the Fund in the respective States.

26. The Board of Trustees further contributed to the work of the Special Rapporteur by providing input for her final thematic report on challenges and lessons learned in combating contemporary forms of slavery, which is to be presented at the twenty-fourth session of the Human Rights Council.

## V. International Day for the Abolition of Slavery and twentieth anniversary of the Fund

27. In a statement issued on 2 December 2012 to commemorate the International Day for the Abolition of Slavery, the Board of Trustees said that slavery persisted in all regions of the world and had acquired new and complex forms. The Board referred to a recent study by the International Labour Organization, which indicated that each year nearly 21 million women, children and men were forced into bonded labour, held as slaves for ritual or religious purposes or trafficked within their countries or across borders, often to be sold into prostitution. Children accounted for more than a quarter of the victims. Such lucrative trafficking in human beings yielded about $32 billion to traffickers every year. In its statement, the Board of Trustees described slavery as a complex and global phenomenon and stated that its elimination required addressing the root causes, including poverty, class polarization, racial discrimination, gender inequalities, exclusion and/or illiteracy. It quoted the Secretary-General of the United Nations as saying that everyone had a role to play in the global fight against slavery. While Governments bore the primary responsibility for eradicating contemporary forms of slavery, it was also vital that business actors ensured that slavery practices did not occur in their workplace and supply chains.

28. The Board indicated in its statement that, within a week, it would be holding its annual meeting to allocate small grants to organizations, including grass-roots groups in remote areas, which assist victims of contemporary forms of slavery. The Board of Trustees stated that the Fund had been established by the General Assembly in 1991 and was administered by the Secretary-General through the Office of the Untied Nations High Commissioner; it was a unique victim-oriented and cost-effective mechanism striving to achieve concrete impact on the ground. Over the past 21 years, the Fund had supported over 460 projects in 95 countries to assist tens of thousands of victims, helping them to break free and recover their lives. The projects included the establishment of rescue centres for children and women victims of forced marriages, vocational training for forced and bonded labourers, and family reunification and re-integration support for victims of trafficking.

29. The Board of Trustees concluded it statement by expressing that, while it was grateful for the financial contributions already received, additional financial support was needed to respond to increasing requests for assistance, echoing the appeal of the Secretary-General to States and private donors to contribute further to the Fund.

## VI. How to contribute to the Fund

30. The Fund depends on contributions from Governments, non-governmental organizations and other private or public entities. Donors should indicate "For the Slavery Fund, account SH" on a payment order. For information on how to contribute, donors are requested to contact the secretariat of the Fund at: Secretariat of the United Nations Voluntary Trust Fund on Contemporary Forms of Slavery, Office of the United Nations High Commissioner for Human Rights, United Nations, CH 1211 Geneva 10, Switzerland; E-mail: slaveryfund@ohchr.org; Telephone: 41 22 917 9376; Fax: 41 22 917 9017.

## VII. Conclusions and recommendations

31. **Owing to the continuing funding constraints, the Board of Trustees, at its seventeenth session, was able to recommend only 55 grants amounting to $ 607,500. The Board is concerned that the Fund is currently working with the very minimum level of required resources to fulfil its mandate and estimates that the Fund would need at least $1.5 million before its eighteenth session, to be held from 18 to 22 November 2013, in order to meet the demand in a satisfactory manner.**

32. **Donors and potential donors are encouraged to increase their support to the Fund so that it can expand its crucial assistance to victims of slavery and are invited to contribute to the Fund before November 2013 in order for the contributions to be duly recorded by the United Nations Treasurer in advance of the eighteenth session of the Board of Trustees.**

# I. Introduction

## A. Submission of the report

1. The present report was prepared in accordance with General Assembly resolution 67/161, in which the Assembly encouraged contributions to the Special Fund established by the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and requested the Secretary-General to submit to the Assembly at its sixty-eighth session a report on the operations of the Special Fund.

## B. Mandate of the Special Fund

2. The Special Fund was established pursuant to article 26 of the Optional Protocol to help finance the implementation of the recommendations made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment following a visit to a State party to the Optional Protocol, as well as education programmes of national preventive mechanisms.

3. The Special Fund receives voluntary contributions from Governments, intergovernmental and non-governmental organizations and other private or public entities. An overview of contributions to the Special Fund to date is provided in section III of the present note.

## C. Management of the Special Fund

4. The Special Fund is administered by the Office of the United Nations High Commissioner for Human Rights (OHCHR), in accordance with the Financial Regulations and Rules of the United Nations. As an interim scheme in place until the financial basis of the Fund is consolidated, the OHCHR Grants Committee, the advisory body to the United Nations High Commissioner for Human Rights, advises the High Commissioner on the eligibility of projects and awards of grants based on the evaluation criteria set out in the guidelines for applications for the project cycles of 2012, 2013 and 2014. Plans are under way to review the current arrangements as of the project cycle of 2015.

## D. Eligibility criteria

5. Grant applications can be submitted for eligible projects aimed at implementing recommendations made by the Subcommittee on Prevention of Torture following a visit to a State party to the Optional Protocol, provided those recommendations are contained in a report made public upon request by the State party. At present, seven countries (Benin, Brazil, Honduras, Maldives, Mexico, Paraguay and Sweden) fulfil this primary admissibility criterion. Applications may be submitted by State parties and their national preventive mechanisms. In addition, applications may be submitted by national human rights institutions that are compliant with the Paris Principles and by non-governmental organizations if the proposed projects are implemented in cooperation with State parties and/or national preventive mechanisms.

6. In addition, the Subcommittee on Prevention of Torture identifies thematic priorities for each cycle. As of the 2013 call for applications, thematic priorities were identified for each country. In addition, projects proposed to address any other specific recommendation contained in the visit reports that described a pressing and compelling need can be considered.

# II. Activities of the Special Fund

## A. Call for applications for 2012

7. The Special Fund became operational in July 2011, and the first call for applications was launched on 1 November 2011, for projects to be awarded and implemented in 2012. Under the call for applications for 2012, for which applicants could request grants of up to $20,000, 69 applications were received, of which 25 were deemed admissible, as they were submitted before the deadline and met the eligibility criteria regarding the publication of Subcommittee reports.[1] In accordance with the guidelines for applications, the secretariat of the Special Fund conducted an extensive evaluation of the 25 admissible projects in the light of the thematic priorities identified by the Subcommittee and taking into consideration the outcome of informal consultations conducted with members of the Subcommittee in February 2012. The evaluation process was carried out in close collaboration with OHCHR field presences, and field visits to eligible applicants were made by staff of OHCHR or the United Nations Development Programme.

8. Nine projects encompassing a wide range of activities in accordance with the Subcommittee recommendations that addressed the prevention of torture, in Benin, Honduras, Maldives, Mexico and Paraguay, were approved, and grants were awarded for a total amount of $166,877. Details on the grants awarded for 2012 are contained in the annex.

9. The remaining 16 projects were rejected by the Grants Committee because they did not meet the selection criteria established by the guidelines for applications for 2012.

## B. Call for applications for 2013

10. The second call for applications to the Special Fund was published on 15 August 2012 and closed on 15 October 2012, for grants for projects to be implemented in 2013. For that call for applications, thematic priorities for each country were identified by the Subcommittee at its seventeenth session, held in Geneva from 18 to 22 June 2012.

11. Applicants could request grants of up to $50,000 for project activities to be implemented in 2013.

12. A total of 34 applications were received, of which four did not meet the primary eligibility criteria. The 30 admissible applications were for projects to be implemented in Benin, Brazil, Honduras, Maldives, Mexico and Paraguay.

[1] At the time, eligible applications had been received for the following six countries: Benin, Honduras, Maldives, Mexico, Paraguay and Sweden.

13. In accordance with the guidelines for applications, the secretariat of the Special Fund conducted an extensive evaluation of the 30 project proposals in the light of the thematic priorities identified and taking into consideration the outcome of informal consultations with members of the Subcommittee conducted in February 2013.

14. Eight grants were awarded to projects aimed at implementing recommendations made by the Subcommittee in all six eligible countries, for a total of $296,854.10. Details on the grants awarded for 2013 are contained in the annex.

15. The remaining project proposals did not meet the criteria set out in the guidelines for applications for 2013, including the thematic criteria, and were therefore not retained by the Grants Committee.

### C. Call for applications for 2014

16. The call for applications to the Special Fund for grants to be awarded for 2014 will be launched in August 2013.

## III. Financial situation of the Special Fund

17. In 2012, the Fund received contributions for a total amount of $403,363. In 2013, as at 6 August, the Fund had received contributions of a total amount of $10,000. Further voluntary contributions are encouraged because the Special Fund is increasingly asserting itself as a valuable tool to assist States and national preventive mechanisms to take measures for the prevention of torture.

18. The table below shows the contributions received in the period 2012-2013.

**Contributions to the Special Fund received in 2012 and 2013**

| *Donors* | *Amount (United States dollars)* | *Date of receipt* |
|---|---|---|
| Argentina | 10 000.00 | 14 February 2013 |
| Czech Republic | 10 219.56 | 17 December 2012 |
| Italy | 18 932.47 | 21 December 2012 |
| Switzerland | 215 982.72 | 20 December 2012 |
| United Kingdom of Great Britain and Northern Ireland | 158 227.85 | 21 March 2012 |

## IV. Making a contribution

19. Contributions to the Special Fund may be accepted from Governments, intergovernmental or non-governmental organizations, private sector organizations and the public at large, in accordance with the Financial Regulations and Rules of the United Nations. Only unearmarked funds are accepted.

20. Contributions to the Special Fund should be marked "Payee: Special Fund established by the Optional Protocol to the Convention against Torture, account CH". Payments may be made in the following ways:

(a) Bank transfer in United States dollars to the United Nations Geneva General Fund, account No. 485001802, J.P. Morgan Chase Bank, 270 Park Avenue, 43rd floor, New York, NY 10017, United States of America (Swift code: CHAS US 33; bank number: (ABA) 021000021);

(b) Bank transfer in euros to the United Nations Office at Geneva, account No. 6161600934, J.P. Morgan Chase AG, Grueneburgweg 2 — 60322 Frankfurt am Main, Germany (Swift code: CHAS DE FX; bank number: (BLZ) 50110800; IBAN: DE78 5011 0800 6161 6009 34);

(c) Bank transfer in pounds sterling to the United Nations Office at Geneva, account No. 23961903, J.P. Morgan Chase Bank, 25 London Wall, London EC2Y 5AJ, United Kingdom (Swift code: CHAS GB 2L; bank number: (SC) 609242; IBAN: GB68 CHAS 6092 4223 9619 03);

(d) Bank transfer in Swiss francs to the United Nations Geneva General Fund, account No. 240-C0590160.0, UBS AG, rue du Rhône 8, case postale 2600, CH-1211 Geneva 2, Switzerland (Swift code: UBSW CH ZH 80A; bank number: 240; IBAN: CH92 0024 0240 C059 0160 0);

(e) Bank transfer in other currencies to the United Nations Geneva General Fund, account No. 240-C0590160.1, UBS AG, rue du Rhône 8, case postale 2600, CH 1211 Geneva 2, Switzerland (Swift code: UBSW CH ZH 80A; bank number: 240; IBAN: CH65 0024 0240 C059 0160 1);

(f) Cheque payable to the United Nations, addressed to Trésorerie, Nations Unies, Palais des Nations, CH-1211 Geneva 10, Switzerland.

21. Donors are requested to inform the Donor and External Relations Section of OHCHR when a payment has been made (including a copy of the bank transfer order or the cheque) to facilitate effective follow-up in the official recording procedure and for preparation of reports of the Secretary-General.

## V. Recommendation

22. **Governments, intergovernmental and non-governmental organizations and other private or public entities are strongly encouraged to contribute to the Special Fund, in order to provide it with the resources required to carry out its mandate.**

# Annex

## Special Fund established by the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: projects approved to date by the Office of the United Nations High Commissioner for Human Rights Grants Committee

**Projects approved under the call for applications for 2012**

| *Country* | *Project summary* | *Applicant* | *Grant amount (United States dollars)* |
|---|---|---|---|
| 1. Benin | The implementation of recommendations concerning juveniles in detention | World Organization against Torture (non-governmental organization) in partnership with Enfants Solidaires d'Afrique et du Monde (local non-governmental organization) | 19 539 |
| 2. Honduras | Training for prison staff on human rights standards and prevention of torture | Ministry of Justice and Human Rights | 20 000 |
| 3. Honduras | Technical support to the national preventive mechanism in Honduras and training for judges, prosecutors and public defenders | Regional Office for Latin America of the Association for the Prevention of Torture (non-governmental organization) in Panama | 14 847 |
| 4. Maldives | The notification of fundamental rights to foreign detainees in their local languages | Human Rights Commission of Maldives (national preventive mechanism) | 13 200 |
| 5. Maldives[a] | Strengthening the work of the national preventive mechanism through the organization of a second national dialogue on the prevention of torture | Association for the Prevention of Torture — Geneva (non-governmental organization), in partnership with the national preventive mechanism | 20 000 |
| 6. Mexico | The provision of training on the use of the *Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* | Colectivo contra la tortura y la impunidad (non-governmental organization) | 19 807 |
| 7. Paraguay | The systematization of police records | Ministry of the Interior | 19 984 |
| 8. Paraguay | The design of fair-trial indicators allowing the monitoring of constitutional guarantees of lawful detention and the presumption of innocence | Supreme Court of Justice | 20 000 |
| 9. Paraguay | Support for the work of the national body in charge of the selection of the commissioners for the future national preventive mechanism | Ministry of Justice and Labour | 19 500 |
| **Total grants for 2012** | | | **166 877** |

[a] Project cancelled due to a political situation in Maldives.

## Projects approved under the call for applications for 2013

| *Country* | *Project summary* | *Applicant* | *Grant amount (United States dollars)* |
|---|---|---|---|
| 1. Benin | The implementation of recommendations of the Subcommittee concerning protection of children deprived of their liberty in Benin | World Organization against Torture (non-governmental organization) in partnership with Enfants Solidaires d'Afrique et du Monde (local non-governmental organization) | 44 428.00 |
| 2. Brazil | Implementation Mechanism for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Minas Gera | Minas Gerais state Human Development Secretariat | 47 712.50 |
| 3. Brazil | Rio de Janeiro state plan to prevent and combat torture | State Preventive Mechanism of Rio de Janeiro | 27 600.00 |
| 4. Honduras | Legal reform and support to the national preventive mechanism in Honduras | Regional Office for Latin America of the Association for the Prevention of Torture (non-governmental organization) in Panama | 30 325.00 |
| 5. Maldives | Support the national preventive mechanism of Maldives for effective implementation of the recommendations made by the Subcommittee on Prevention of Torture and the national preventive mechanism | Human Rights Commission of Maldives (national preventive mechanism) | 15 703.60 |
| 6. Mexico | Training on combating torture for the Mexican judiciary in partnership with the Office of the United Nations High Commissioner for Human Rights, members of the Subcommittee on Prevention of Torture and key national justice institutions | International Bar Association's Human Rights Institute (non-governmental organization) | 46 855.00 |
| 7. Paraguay | Contribution to the development of public policies aimed at the prevention of torture and cruel, inhuman or degrading treatment within the purview of the judiciary | Supreme Court of Justice | 34 230.00 |
| 8. Paraguay | Strengthening capacities on human rights of the Public Prosecutor | Training centre of the Office of the Public Prosecutor | 50 000.00 |
| **Total grants for 2013** | | | **296 854.10** |

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Item 69 (a) of the provisional agenda*
**Promotion and protection of human rights: implementation of human rights instruments**

# United Nations Voluntary Fund for Victims of Torture

## Report of the Secretary-General

*Summary*

The present report is submitted in accordance with General Assembly resolutions 36/151 and 66/150. It describes the recommendations for grants to beneficiary organizations that were adopted by the Board of Trustees of the United Nations Voluntary Fund for Victims of Torture at its thirty-sixth session. The report also provides information on policy decisions adopted by the Board at its thirty-seventh session.

* A/68/150.

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# I. Introduction

## A. Submission of the report

1. The present report was prepared in accordance with the arrangements approved by the General Assembly in its resolution 36/151, by which it established the United Nations Voluntary Fund for Victims of Torture. It presents the recommendations adopted by the Board of Trustees of the Fund at its thirty-sixth session, held in Geneva from 15 to 19 October 2012, and the policy decisions adopted at its thirty-seventh session, held in Geneva from 4 to 8 March 2013. The United Nations High Commissioner for Human Rights approved the recommendations of the Board on behalf of the Secretary-General on 19 October 2012 and 19 March 2013, respectively. The present report complements the report on the activities of the Fund submitted to the Human Rights Council at its twenty-second session (A/HRC/22/19).

## B. Mandate of the Fund

2. The Fund receives voluntary contributions from Governments, non-governmental organizations and individuals. In accordance with the practice established by its Board of Trustees in 1982, the Fund provides grants to established channels of assistance, including non-governmental organizations, associations of victims and family members of victims, private and public hospitals, legal clinics, public interest law firms and individual lawyers, that submit projects involving medical, psychological, social, financial, legal, humanitarian and other forms of assistance to victims of torture and members of their families.

## C. Administration of the Fund and Board of Trustees

3. The Secretary-General administers the Fund through the Office of the United Nations High Commissioner for Human Rights (OHCHR) with the advice of a Board of Trustees composed of five members acting in their personal capacity and appointed by the Secretary-General with due regard to equitable geographical distribution and in consultation with their Governments. On 26 October 2011, the Secretary-General reappointed Mercedes Doretti (Argentina) for a final term of three years and appointed Natasa Kandic (Serbia), Maria Cristina de Mendonca (Portugal), Morad el Shazly (Egypt) and Anastasia Pinto (India) for three-year terms, renewable once. All members of the Board attended the thirty-sixth and thirty-seventh sessions. Following the thirty-seventh session, Ms. Kandic informed the Secretariat of her decision to resign from the Board. At the time of writing of the present report, arrangements to replace her are under way.

4. Pursuant to recommendations formulated by the Office of Internal Oversight Services in its audit report on the United Nations Voluntary Trust Fund on Contemporary Forms of Slavery of 2007, as of 1 January 2012 the secretariats of the Fund for Victims of Torture and the Trust Fund on Contemporary Forms of Slavery were placed within the Human Rights Treaties Division of OHCHR. In the current reporting period, the joint secretariat has reviewed and aligned the working methods of both Funds with a view to increasing cost-effectiveness, pooling expertise and

sharing best practices. The webpage of the Fund for Victims of Torture has also been improved.

5. In addition, at the beginning of January 2013 two fellows joined the Fund for Victims of Torture to assist the secretariat with substantive research and analysis of developments and jurisprudence concerning torture and with preparing a compilation of best practices and lessons learned on projects financed by the Fund.

6. Lastly, in the context of the joint secretariat and subject to availability of funding, it is expected that the Fund for Victims of Torture and the Trust Fund on Contemporary Forms of Slavery will endeavour to avail themselves of one fellowship each in 2014.

## II. Management of grants

### A. Admissibility criteria

7. Project admissibility criteria are outlined in the guidelines of the Fund for Victims of Torture, which were revised at the thirty-sixth session of the Board of Trustees. The guidelines require a project to be presented by a non-governmental entity, including non-governmental organizations, associations of victims and family members of victims, private and public hospitals, legal clinics, public interest law firms and individual lawyers. The beneficiaries must be direct victims of torture or direct family members. Priority is given to projects providing direct assistance to victims of torture, which may consist of medical or psychological assistance, help with social or financial reintegration through vocational training for victims or various forms of legal assistance for victims or members of their families, including assistance in seeking redress or applying for asylum. Depending on the resources available, the Fund may finance projects to organize training programmes, seminars or conferences to allow health-care professionals or other service providers to exchange best practices. Requests for grants for projects involving investigation, research, studies, publications or similar activities are not admissible.

8. The Fund may provide emergency assistance to individuals in countries where no project is receiving support. This type of request is examined according to specific procedures outlined in the guidelines of the Fund. Detailed information on the various types of assistance provided through the projects financed by the Fund, as well as their impact on beneficiaries, can be found in the report of the Secretary-General to the General Assembly at its fifty-eighth session (A/58/284, paras. 27-34).

### B. Monitoring and evaluation of grants

9. From August 2012 to July 2013, evaluation and monitoring of organizations already funded by the Fund or of applicants were undertaken by staff of the Fund secretariat, Board members and OHCHR field presences in Bosnia and Herzegovina, Burundi, Cambodia, the Democratic Republic of the Congo, France, Germany, Guatemala, Hungary, Italy, Lebanon, Liberia, Malaysia, Mexico, New Zealand, the Philippines, the Russian Federation, South Africa, the State of Palestine, Switzerland, Tunisia and the United Kingdom of Great Britain and Northern Ireland.

# III. Financial situation of the Fund

10. From 2008 to 2011, the annual voluntary contributions to the Fund decreased dramatically by 30 per cent ($3.6 million), amounting to $7.9 million in 2011. This situation, largely attributed to the ongoing financial crisis, made it difficult to meet the ever-increasing demands for assistance.

11. Because of this significant decrease, at its thirty-sixth session the Board was compelled to maintain the strategic cuts to grants introduced in 2012 in addition to those already introduced for the 2011 cycle, which had decreased by 40 per cent grants awarded to projects located in States of the group of Western European and other States and by 30 per cent grants awarded to projects located in other regions (see also para. 16 below).

12. The Board will hold its thirty-eighth session from 30 September to 4 October 2013, during which it will allocate grants for the period January to December 2014. Regrettably, while the trend has been reversed and in 2012 contributions amounting to $8.4 million were received, it is anticipated that funding will not rise back to a satisfactory level; hence, the cuts applied to grants over the past two years are likely to continue in 2014.

13. The Secretary-General in his statement issued to commemorate the United Nations International Day in Support of Victims of Torture and the Human Rights Council in its resolution 22/21 have both appealed to States to contribute generously to the Fund.

### Contributions and pledges received

14. The table below shows the contributions and pledges received since the previous report of the Secretary-General to the General Assembly on the activities of the Fund (A/67/264). These contributions will enable the Board to make recommendations at its thirty-eighth session for grants to be disbursed for the period from 1 January to 31 December 2014.

**Contributions and pledges received from 13 July 2012 to 12 July 2013**

| *Donor* | *Amount (United States dollars)* | *Date of receipt* |
|---|---|---|
| **Contributions** | | |
| **States** | | |
| Argentina | 15 000 | 14 February 2013 |
| Austria | 110 821 | 5 June 2013 |
| Chile | 10 000 | 7 February 2013 |
| Czech Republic | 10 220 | 17 December 2012 |
| Denmark | 345 312 | 28 November 2012 |
| Finland | 338 083 | 2 November 2012 |
| Germany | 717 080 | 12 July 2013 |
| India | 24 982 | 22 March 2013 |
| Ireland | 111 257 | 3 May 2013 |
| Kuwait | 10 000 | 25 February 2013 |

| *Donor* | *Amount (United States dollars)* | *Date of receipt* |
|---|---|---|
| Liechtenstein | 26 881 | 22 November 2012 |
| Morocco | 2 000 | 25 July 2012 |
| Norway | 113 976 | 27 June 2013 |
| Peru | 1 820 | 30 January 2013 |
| Saudi Arabia | 50 000 | 7 September 2012 |
| South Africa | 10 726 | 22 March 2013 |
| Spain | 59 681 | 2 January 2013 |
| Switzerland | 215 983 | 20 December 2012 |
| Turkey | 10 000 | 3 December 2012 |
| United Arab Emirates | 10 000 | 7 March 2013 |
| United States of America | 6 000 000 | 5 November 2012 |
| Holy See | 1 000 | 7 February 2013 |
| **Subtotal** | **8 194 822** | |
| **Private and public donors** | | |
| NJCM Nederlands Juristen Comite | 5 980 | 31 December 2012 |
| Individual, University of Dundee | 7 969 | 10 May 2013 |
| NJCM Nederlands Juristen Comite | 19 526 | 10 April 2013 |
| European Union Ambassadors | 1 254 | 22 March 2013 |
| **Subtotal** | **34 729** | |
| **Total contributions** | **8 229 551** | |
| **Pledges 2013** | | |
| Finland | 365 059 | |
| Turkey | 10 000 | |
| **Total pledges** | **375 059** | |

# IV. Thirty-sixth session of the Board of Trustees

15. The thirty-sixth session of the Board was held from 15 to 19 October 2012. The Board reviewed applications for funding and made recommendations on grants to be allotted to beneficiary organizations for the period from 1 January to 31 December 2013. At that session, the Board examined information prepared by its secretariat concerning 266 admissible project proposals, amounting to $14,823,044, including new applications for 2013. It considered positively the renewal of 236 ongoing projects amounting to $6,786,500 and recommended the approval of 18 new projects amounting $337,100. All approved grants aim at assisting victims of torture and members of their families worldwide through organizations implementing projects providing psychological, medical, social, legal, economic and other forms of humanitarian assistance in over 70 countries. The Board also considered requests for three projects amounting to $17,500 for training and

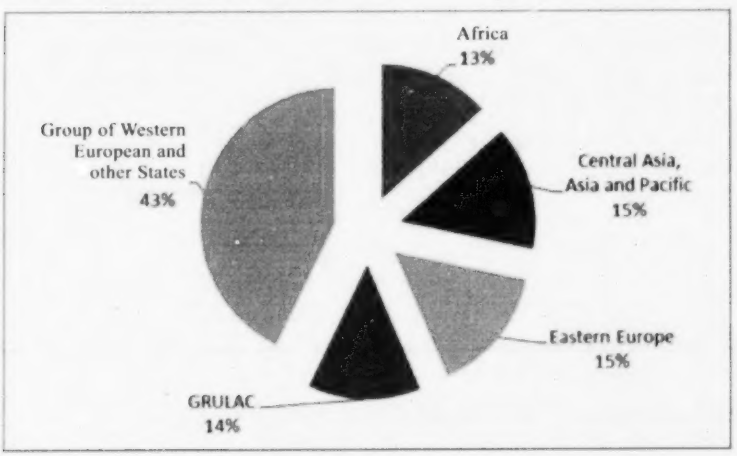
seminars for professionals assisting victims to exchange information on experiences and best practices. The High Commissioner approved the recommendations of the Board on 19 October 2012 on behalf of the Secretary-General.

16. As outlined in paragraph 11 above, as a result of the decreased level of contributions, at its thirty-sixth session the Board was compelled to maintain the strategic cuts introduced at its thirty-fifth session. For the second consecutive year, support to existing grant recipients was capped, as a rule, at $80,000 (instead of the usual $120,000) and, in the case of first-time recipients, at $20,000 (instead of the usual $50,000). Funding for training and seminars for professionals assisting victims was capped at $7,500 (instead of the usual $30,000).

17. Despite the persisting budget shortfall, the Board recommended to set aside $300,000 in order to respond to urgent requests and unforeseen needs during 2013. At the time of writing of the present report, five emergency grants had been approved for the reporting period 2012/13 for a total amount of $229,594 in Guatemala, Jordan (for torture victims fleeing from the Syrian Arab Republic), Lebanon, Mexico and Uruguay.

18. The figure below shows the allocation of grants by region.

Figure
**Grants awarded in 2012, by region**




19. The Board also reiterated its recommendation made at the thirty-fifth session to provide two fellowships for the Fund for 2013.

20. The Board also undertook a complete revision of the guidelines of the Fund with a view to fostering greater rigour and accountability from applicants and grant recipients. The revised guidelines bring further clarity to the procedure for awarding emergency grants.

21. Finally, the Board welcomed the initiative by the secretariat to conduct a three-day internal training course in September 2012 on project monitoring and evaluation.

## V. Thirty-seventh session of the Board of Trustees

22. The thirty-seventh session of the Board was held from 4 to 8 March 2013. At that session, the Board expressed its concern about the increasing fragmentation of the grants awarded to ongoing projects due to the decrease in contributions to the Fund. In that context, the Board set out to develop a new funding formula, which would realign the Fund with its original mandate to assist victims in a purely humanitarian spirit and prioritize those victimized during emerging human rights situations, while continuing to ensure long-term assistance to previously identified victims.

23. Furthermore, the Board held a meeting with the Secretary of the Committee against Torture to take stock of the recently adopted General Comment No. 3 on the implementation by States parties of article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, concerning the obligation of States to give redress and provide rehabilitation to victims of torture. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan Mendez, also met with the Board and offered valuable insight into his work in the field and his new thematic report and expressed his support for the Fund. The Board of Trustees and the Special Rapporteur agreed to meet annually and the secretariat introduced the necessary arrangements into the calendar of sessions for that to happen.

24. The Board agreed on a new funding formula that will be tested progressively by the secretariat of the Fund over the next two years, which should include increased support for new projects, training and capacity-building projects; and a better and proactive response of the Fund to emerging situations while maintaining long-term and predictable support to identified victims of torture and their relatives worldwide. The funding formula will have optimal impact if the Fund succeeds in securing sustained availability of $12,000,000 for grants.

## VI. United Nations International Day in Support of Victims of Torture

25. On 26 June 2013, the Secretary-General made a statement to commemorate the United Nations International Day in Support of Victims of Torture in which he called on Member States to step up efforts to assist all those who had suffered from torture and other cruel, inhuman or degrading treatment or punishment. He noted that 2013 was also the twenty-fifth anniversary of the establishment of the Committee against Torture, which, along with other United Nations human rights mechanisms such as the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and the Special Rapporteur on torture, was vital to strengthening a victim-oriented approach that also included a gender perspective. That effort had been further strengthened by the adoption in 2013 of a Human Rights Council resolution focusing on the rehabilitation of torture victims. The Secretary-General urged all Member States to accede to and fully implement the Convention against Torture, to support the United Nations Voluntary Fund for Victims of Torture and to work together to end torture throughout the world and ensure that countries provided reparation for victims.

26. The International Day was commemorated through the online publication of a story about a Syrian female victim of torture who had sought refuge in Jordan where she received assistance from a non-profit organization supported by the Fund (see also para. 17 above and 31 below). In addition, the Committee against Torture, the Subcommittee on Prevention of Torture, the Special Rapporteur on torture, the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence and the Board of Trustees of the Fund for Victims of Torture issued a joint statement calling upon all Member States to step up efforts to support victims of torture, which was the focus of the mandate and activities of the Fund.

27. As part of the joint statement, Claudio Grossman, Chair of the Committee against Torture, which in November 2012 had issued a landmark definition of the right to reparation for victims in its General Comment no. 3, commented that torture unfortunately continued to be practised in many countries, made possible by the dehumanization of the victim, torturer and society at large. He noted that victims had the enforceable right to reparation that included fair and adequate compensation and access to as full a rehabilitation as possible, and that States also needed to ensure that victims were not exposed to further risk of ill-treatment and that violations were investigated and punished. That stance of the Committee had been reinforced in March 2013 by Human Rights Council resolution 22/21, in which the Council had called upon States to not only provide redress for victims of torture but to ensure that victims were fully involved in the process to help them rebuild their lives and reintegrate into society.

28. The Special Rapporteur on torture, Juan E. Méndez, said that a victim-centred approach required individual assessment of the needs of the victim and treatment that went beyond the short term A holistic approach was crucial to ensure that professionals worked with, rather than on, a person who had been tortured. Another key duty of States, the experts stressed in the statement, was to tackle impunity and strengthen judicial proceedings to prevent torture from continuing.

29. The Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, said that effective redress was not possible without States addressing impunity. In addition to receiving reparation, it was crucial for victims to be involved in truth-seeking exercises and in judicial processes to ensure effective and impartial investigations, prosecutions and judgements that reflected the gravity of the offence. It was also central for societies to put institutions and mechanisms in place to prevent future violations, he said.

30. According to Malcolm Evans, the Chair of the Subcommittee on the Prevention of Torture, which conducts field visits to places of detention, rehabilitation of victims was key not only for the individuals affected but for society as a whole. He commented that wherever and whenever torture and ill-treatment occurred, a meaningful prevention implied prevention for the victims and their relatives. The Subcommittee had learned from direct experience the central role that rehabilitation occupied in the cycle of prevention.

31. The experts also said that the focus on a victim-oriented approach highlighted the need for properly resourced rehabilitation centres. Every year, the Fund for Victims of Torture supported hundreds of such centres to give humanitarian, medical and legal assistance to victims and their relatives, providing assistance annually to an estimated 50,000 to 70,000 victims and their relatives, including Syrian refugee Sabeen, who had been kidnapped, repeatedly raped, and had seen family members

killed in front of her. Sabeen, who was 24 years old, fled to Jordan where her mother took her to a centre that had received a grant from the Fund to provide therapy and support for torture victims. The Fund, which relied on voluntary contributions from Governments, the private sector and individuals, had seen its donations drop by 30 per cent since 2008 to $8.4 million in 2012. Its donor base had also shrunk from 38 donors in 2008 to 22 in 2012.

32. Mercedes Doretti, a forensic anthropologist and Chair of the Board of Trustees of the Fund, noted that too many Governments were cutting back on contributions to the Fund in the light of economic problems. She noted that ensuring prompt and proper treatment for victims of torture could reduce the financial cost to the State. Ms. Doretti concluded that the experts strongly hoped that the renewed focus on redress and rehabilitation for victims would translate into more resources being made available to respond to thousands of torture victims.

## VII. How to make a contribution to the Fund

33. Governments, non-governmental organizations and other private or public entities can contribute to the Fund. For more information on how to contribute and further details about the Fund, donors are requested to contact the secretariat of the United Nations Voluntary Fund for Victims of Torture, Office of the United Nations High Commissioner for Human Rights, United Nations, CH 1211 Geneva 10, Switzerland; e-mail: unvfvt@ohchr.org; telephone: 41 22 917 9624; fax: 41 22 917 9017.

## VIII. Conclusions and recommendations

34. **Pursuant to the appeals made by the General Assembly in its resolution 66/150 and by the Board of Trustees of the Fund as included in the previous report of the Secretary-General (A/67/264), donors are invited to pay their contributions to the Fund before 31 December 2013 in order that the contributions may be used in 2014.**

35. **In the light of the difficult financial situation faced since 2011, the Board also reiterates its call to regular donors to increase, as much as possible, their contributions to the Fund in order to provide the Board with the necessary resources to meet the growing needs of victims of torture and members of their families worldwide. Without an increased level of funding, the Fund will not be in a position to respond adequately to torture victims of any new crisis, while at the same time continuing to secure long-term assistance to previously identified victims.**

36. **The Board strongly encourages Governments that have not yet contributed to the Fund to do so for the first time, preferably by December 2013.**

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Item 69 (b) of the provisional agenda*
**Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms**

# Human rights of migrants

## Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the report of the Special Rapporteur on the human rights of migrants, François Crépeau, in accordance with Assembly resolution 67/172.

* A/68/150.

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# Report of the Special Rapporteur on the human rights of migrants

*Summary*

The present report is submitted by the Special Rapporteur on the human rights of migrants in accordance with General Assembly resolution 67/172. The report first introduces the Special Rapporteur's activities throughout the reporting period. The thematic section is dedicated to global migration governance. The Special Rapporteur provides an overview of global migration governance, including recent developments and the current institutional and normative framework. He then explores the need for a strengthened institutional framework based on human rights and demonstrates how this would be beneficial for States. He also explores different proposals for possible new institutional frameworks for migration within the United Nations system.

The report contains specific recommendations in relation to the High-level Dialogue on International Migration and Development, which will be held by the General Assembly on 3 and 4 October 2013. The Special Rapporteur hopes that the present report will be of use to Member States and other stakeholders during the High-level Dialogue.

# I. Introduction

1. The present report is submitted to the General Assembly by the Special Rapporteur on the human rights of migrants, François Crépeau, pursuant to resolution 67/172.

# II. Activities

2. During the period under review, the Special Rapporteur participated in a number of conferences and events related to his mandate, including the sixth meeting of the Global Forum on Migration and Development, held in Mauritius in November 2012.

3. In February 2013, he participated at the Eleventh Coordination Meeting on International Migration in New York, and he was the keynote speaker at the third round table of the 2013 High-Level Dialogue series on the theme "Towards the 2013 High-level Dialogue on International Migration and Development: measures to ensure respect for and protection of the human rights of all migrants, with particular reference to women and children, as well as to prevent and combat the smuggling of migrants and trafficking in persons and to ensure regular, orderly and safe migration".

4. In April 2013, he participated in a seminar organized in Brussels by the Office of the United Nations High Commissioner for Human Rights (OHCHR) on the implementation by European Union member States of recommendations of human rights mechanisms with regard to migration.

5. In May 2013, the Special Rapporteur presented his second annual report to the Human Rights Council (A/HRC/23/46), focusing on the management of the external borders of the European Union and its impact on the human rights of migrants, with accompanying country visit reports on his missions to Greece, Italy, Tunisia and Turkey. The reports were the result of a year-long study during which the Special Rapporteur liaised closely with the European Union. He travelled to Brussels in May 2013 to present the final report to the European Union.

6. In June 2013, the Special Rapporteur was the general rapporteur at a seminar organized in Strasbourg, France, by the European Union Agency for Fundamental Rights and the European Court of Human Rights on the occasion of the launch of a handbook on European law relating to asylum, borders and immigration.

7. Also in June 2013, he participated in an expert meeting on migration, human rights and governance organized by OHCHR.

# III. Thematic section: a human rights framework for global migration governance

## A. Background

8. Migration is a complex phenomenon which affects most, if not all, States in the world and is closely linked to other global issues, such as development, health, environment and trade. States have created international frameworks for such other

global issues, recognizing the advantages of regulation at the international level, but despite the existence of legal frameworks on migration issues, a comprehensive framework for migration governance is still lacking. Certain aspects of migration are more frequently discussed at the bilateral and multilateral levels, such as the connections between migration and development. However, given that migration is in essence a fundamentally human phenomenon, the Special Rapporteur notes the need for an international migration governance regime strongly focused on human rights.

9. Thus, in the light of the upcoming High-Level Dialogue on International Migration and Development and the post-2015 development agenda, the Special Rapporteur decided to focus his report on examining global governance processes on migration, in particular with a view to analysing whether human rights are effectively included and mainstreamed therein.

## 1. The concept of global migration governance

10. Global governance has been defined as the norms, rules, principles and decision-making procedures that regulate the behaviour of states (and other transnational actors).[1] In the sphere of migration, governance assumes a variety of forms, including the migration policies and programmes of individual countries, inter-State discussions and agreements, multilateral forums and consultative processes, and the activities of international organizations, as well as relevant laws and norms.[2]

11. Owing to the lack of a comprehensive framework, global migration governance is fragmented, with different institutional approaches and normative frameworks relating to specific aspects of migration, such as the human rights of migrants, smuggling of migrants, trafficking, refugees and asylum seekers, and labour migration.

## 2. Brief overview of developments relating to global migration governance

12. In 1990, the General Assembly adopted the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Following its entry into force in 2003, a Committee to monitor its implementation by States was established.

13. In 1994, the International Conference on Population and Development, held in Cairo, included a chapter on international migration in its Programme of Action.

14. In 1999, the Commission on Human Rights created the mandate of the Special Rapporteur on the human rights of migrants.

15. In 2002, the Secretary-General, in his report entitled "Strengthening of the United Nations: an agenda for further change" (A/57/387), noted the need to take a more comprehensive look at the various dimensions of the migration issue. Subsequently, he set up a working group on migration, convened by his Special Adviser, Michael Doyle, as part of his proposals for strengthening the United Nations.

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[1] Alexander Betts, ed., *Global Migration Governance* (Oxford, Oxford University Press, 2011).

[2] Global Commission on International Migration, "Migration in an interconnected world: new directions for action" (2005).

16. The report of the working group (the "Doyle report") highlighted various aspects of migration, such as the protection of migrants, asylum and labour migration, as well as the state of international cooperation. It formulated three recommendations: (a) to close the legal and normative gaps in the regimes for migrants; (b) to fill the institutional gaps through enhanced coordination; and (c) to create a global commission.

17. In response to the Doyle report, the Global Commission on International Migration was created in 2003 by a group of States as an independent commission to make recommendations on how to strengthen the national, regional and global governance of migration.

18. In 2004, the International Labour Conference, in the adoption of a plan of action for migrant workers, achieved consensus among its tripartite constituents (labour ministries and employers' and workers' organizations) on a rights-based approach to labour migration.

19. The report of the Global Commission on International Migration, finalized in 2005, recommended the establishment of an inter-agency global migration facility within the United Nations system.

20. In 2006, the Secretary-General established the Global Migration Group with a view to increasing system-wide coherence.

21. In 2006, upon the recommendation of the Secretary-General, the General Assembly held its first ever High-level Dialogue on International Migration and Development. In the lead-up to the High-level Dialogue, the Secretary-General appointed a Special Representative on International Migration and Development.

22. Following the High-level Dialogue, the opposition by States to the establishment of a forum within the United Nations to discuss migration led to the creation of the Global Forum on Migration and Development outside the United Nations framework.

23. In December 2008, the General Assembly decided to follow up the High-level Dialogue held in 2006 by convening a second one in 2013.

24. In 2012, Heads of State and Government, in the outcome document of the United Nations Conference on Sustainable Development, held in Rio de Janeiro, Brazil (General Assembly resolution 66/288, annex), called upon States to address international migration through international, regional or bilateral cooperation and dialogue and a comprehensive and balanced approach, recognizing the roles and responsibilities of countries of origin, transit and destination in promoting and protecting the human rights of all migrants, and avoiding approaches that might aggravate their vulnerability.

25. Also in 2012, the United Nations System Task Team on the Post-2015 United Nations Development Agenda recommended three fundamental principles for the post-2015 development agenda, namely human rights, equality and sustainability. The Task Team noted that better migration governance, both in countries of origin and destination, would be essential.

26. In December 2012, the Secretary-General's Policy Committee endorsed a decision that, in order to promote a strong focus on the human rights of migrants in the lead-up to the 2013 High-level Dialogue and beyond, OHCHR, in consultation

with the Global Migration Group and other United Nations system partners, should prepare a concise analytical report by mid-2013 on migration and human rights.

## B. Legal and normative framework

27. Migration is a multifaceted phenomenon, and the legal regime dealing with its different aspects has developed at different stages. This sectoral approach is partly due to States' past reluctance towards discussing all aspects of migration in a comprehensive way. Despite this reality, the Special Rapporteur believes that the international legal framework, which incorporates international human rights law, the refugee regime, international labour standards and transnational criminal law (smuggling of migrants and trafficking in persons), is a solid framework for policymaking on migration. However, the inadequate implementation of these standards at the national level remains a major problem.

### 1. Human rights[3]

28. All migrants, without discrimination, are protected by international human rights law. There are very few and narrowly defined exceptions to this, namely the right to vote and be elected and the right to enter and stay in a country. Even for those exceptions, procedural safeguards must be respected, as well as obligations related to non-refoulement, best interests of the child and family unity. All other rights extend to all migrants, whatever their administrative status. Any distinction must be proportionate, reasonable and serve a legitimate objective: the two human rights covenants (International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights) explicitly refer to "national origin" as a prohibited ground of discrimination in the enjoyment of civil, political, economic, social and cultural rights.

29. Only 46 States have ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. However, it mainly restates rights which already follow from other treaties. All States have ratified at least one of the other core international human rights treaties and, owing to the non-discrimination principle, are thus obliged to respect the human rights of migrants, including those in an irregular situation.

### 2. Refugees and stateless persons

30. The global refugee regime, based on the 1951 Convention relating to the Status of Refugees and the 1967 Protocol thereto, prevents the expulsion of and provides a status to persons who have a well-founded fear of persecution on account of race, religion, nationality, membership of a social group or political opinion (the principle of "non-refoulement"). The expansion of the principle has led to the concept of "subsidiary protection" reaching beyond the scope of the 1951 Convention.

[3] For a more detailed overview, see the report of OHCHR entitled "Migration and human rights: improving human rights-based governance of international migration", available from www.ohchr.org/EN/Issues/Migration/Pages/HLD2013.aspx.

31. The 1954 Convention relating to the Status of Stateless Persons aims to regulate and improve the legal status of stateless persons. The 1961 Convention on the Reduction of Statelessness deals with the means of avoiding statelessness.

### 3. Labour standards

32. All international labour standards of the International Labour Organization (ILO) apply to migrant workers unless otherwise stated. They include the eight ILO fundamental rights conventions; the specific instruments concerned with the protection of migrant workers and the governance of labour migration, namely the Convention concerning Migration for Employment (Revised 1949) (Convention No. 97) and the Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (Convention No. 143) of 1975, as well as other instruments that contain specific provisions on migrant workers, such as the Convention concerning Private Employment Agencies (Convention No. 181) of 1997 and the Domestic Workers Convention (Convention No. 189) of 2011.

33. In addition, the non-binding Multilateral Framework on Labour Migration, adopted in 2005, provides guidance, inter alia, on the human rights of all migrant workers, regardless of their status, and on the regulation of recruitment agencies.

### 4. Trafficking in persons

34. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime contains rules concerning the prevention of trafficking, as well as assistance to and protection of victims of trafficking. It also provides that States should consider permitting victims of trafficking to remain in their territory, temporarily or permanently, in appropriate cases.

### 5. Migrant smuggling

35. The Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, requires States parties to establish as a criminal offence the smuggling of migrants. However, the criminalization requirement does not apply to the migrants who are being smuggled. The Protocol states that migrants shall not become liable to criminal prosecution under the Protocol for the fact of having been the object of smuggling.

## C. Institutional framework

36. There is no migration organization within the United Nations, and no coherent institutional framework governing migration exists.

37. States continue to attempt to govern migration largely on a unilateral basis. This has led to a lack of coherence between global, regional and national governance and retreat from binding United Nations-based frameworks, with state preference for informal processes, such as the Global Forum on Migration and Development and regional consultative processes.

38. The International Organization for Migration (IOM) promotes itself and is sometimes referred to as the global lead agency on migration.[4] However, as yet, IOM does not have a comprehensive mandate on migration issues, and especially not a legal protection mandate enshrined in its Constitution, or a clear policy on protection. Its mandate focuses primarily on providing services to States, including in relation to the return of migrants. Different United Nations agencies and entities, such as OHCHR, ILO, the United Nations Children's Fund (UNICEF), the Office of the United Nations High Commissioner for Refugees (UNHCR), the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the Department of Economic and Social Affairs of the Secretariat have mandates and expertise on a wide range of migration-related issues complementary to those of IOM.

## 1. United Nations

### (a) General Assembly

39. The General Assembly has taken some crucial measures in relation to the human rights of migrants, including the adoption of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families in 1990 and the holding of the first High-level Dialogue on International Migration and Development in 2006.

40. The Third Committee holds interactive dialogues with the Special Rapporteur, who presents annual thematic reports, and adopts annual resolutions on the protection of migrants. Likewise, the Second Committee adopts resolutions on migration and development.

41. In 2012, the General Assembly, in its resolution 67/172, requested Member States, the United Nations system, international organizations, civil society and all relevant stakeholders, especially the United Nations High Commissioner for Human Rights, the Special Rapporteur and the Global Migration Group, to ensure that the High-level Dialogue on International Migration and Development to be held in 2013 analyses the linkage between migration and development in a balanced and comprehensive manner that includes, among others, a human rights perspective.

42. The Special Rapporteur looks forward to the High-level Dialogue and hopes for an outcome document that will contribute to better protection of the human rights of migrants. Furthermore, he encourages the General Assembly to hold regular high-level dialogues.

### (b) Human Rights Council

43. The Human Rights Council adopts resolutions on the human rights of migrants annually and holds interactive dialogues with the Special Rapporteur, who presents annual thematic reports and country visit reports to the Human Rights Council.

44. The Special Rapporteur believes that there is potential for more engagement by the Human Rights Council on issues relating to the human rights of migrants. Mainstreaming migrants' rights in the Council's work in relation to, inter alia, the rights of the child, women's rights, xenophobia and racial discrimination, and rights of minorities should be considered.

[4] See for example www.iom.int/files/live/sites/iom/files/What-We-Do/docs/2013-Global-RCP-Chairs-Summary-English.pdf.

45. The Human Rights Council should also consider holding an annual panel discussion on the human rights of migrants, with a different thematic focus each year.

### (c) Global Migration Group

46. The Secretary-General created the Global Migration Group in 2006, building on the Geneva Migration Group, as a way to provide a space for inter-agency dialogue and improve the coordination of migration-related work at the United Nations. Membership of the Group currently comprises 15 United Nations entities and agencies: ILO, OHCHR, the United Nations Conference on Trade and Development, the United Nations Development Programme, UNESCO, the United Nations Population Fund, UNHCR, UNICEF, the United Nations Institute for Training and Research, the United Nations Office on Drugs and Crime (UNODC), the Department of Economic and Social Affairs, the regional commissions, the United Nations Entity for Gender Equality and the Empowerment of Women, the World Health Organization and the World Bank, as well as IOM.

47. The members of the Global Migration Group have partly overlapping mandates, and this has led to a somewhat fragmented institutional picture. While welcoming its important work, the Special Rapporteur notes the need for a clearer vision, leadership and policy coherence on the part of the Group, which has full respect for human rights as its core. In 2010, on the occasion of the meeting of the Global Forum on Migration and Development held in Mexico, the Group issued a landmark statement on the human rights of irregular migrants. The Special Rapporteur urges all member agencies of the Group to implement the approach set out in the statement.

48. The Special Rapporteur hopes that its recent internal review will lead to a strengthened Global Migration Group, with more attention given to the human rights of migrants. While OHCHR has the primary responsibility for human rights, ILO and UNHCR also have responsibilities in areas of human rights, and the human rights of migrants should also be mainstreamed in the work of all the other member agencies of the Group. In this respect, the Special Rapporteur notes with appreciation that the Global Migration Group recently established a working group on migration, human rights and gender.

## 2. Outside the United Nations framework

### (a) Global Forum on Migration and Development

49. At the High-level Dialogue on International Migration and Development held in 2006, the Secretary-General proposed the creation of a global forum as a venue for discussing issues related to international migration and development in a systematic and comprehensive way (see A/61/515). Subsequently, the Global Forum on Migration and Development was created by States outside the United Nations framework. The Global Forum has met annually since 2007 and is seen as the most visible and high-profile forum for multilateral dialogue on migration. It is linked to the Secretary-General through his Special Representative on International Migration and Development. The interaction of United Nations agencies and entities with the Global Forum has been more sporadic, and the extent of their involvement has been largely dependent on the willingness of the Chair-in-Office to allow their participation. The Special Rapporteur notes that the involvement of some Global

Migration Group agencies has been encouraged more than others, and the Global Forum has tended to seek assistance from IOM. Furthermore, he observes the importance of including a stronger focus on human rights and a human rights framework within the mandate of the Special Representative of the Secretary-General.

50. The Global Forum on Migration and Development has tended to focus more on the economic development dimensions of migration, rather than on the rights dimension. While issues related to human rights, including the protection of migrants, are sometimes discussed, the human rights of migrants are unfortunately rarely the focus and have not always even been present in the discussions. Meetings of the Global Forum are attended largely by either ministry of interior officials or diplomats rather than by human rights or labour ministry officials. Norm-based discussions have too frequently been dismissed as divisive, allowing for the creation of a discussion space that can at times ignore the fact that States have voluntarily assumed human rights obligations. The Special Rapporteur insists on the fact that migrants should always be seen first and foremost as human beings with human rights, rather than agents for development through, inter alia, remittances.

51. The Global Forum on Migration and Development is an informal, non-binding, voluntary and government-led process[5] which provides a platform for informal dialogue between States. There is no proper record of what is being said and, therefore, no transparency. While the discussions of the Global Forum can contribute to more formal cooperation and coordination, the Special Rapporteur notes that, owing to its voluntary, informal and non-binding nature, it has so far not led to much substantive change.

52. One of the main objectives of the Global Forum is to exchange good practices and experiences,[5] but, in the absence of a normative framework to guide the discussions, this can turn into an exchange of bad practices or even a race to the bottom in terms of policies. For example, circular migration schemes frequently discussed at the Global Forum can have extremely negative consequences in terms of human rights, including on access to economic and social rights, the right to family life and protection from exploitation.

53. At its meeting in 2010, participating States agreed to conduct an assessment of the Global Forum. As noted in the consolidated assessment paper on the strategic and political analysis phase of the assessment (phase 2),[6] the Global Forum does not monitor whether or how Governments follow up on its outcomes. It has a lack of institutional memory, as the Chair alternates annually, between developed and developing countries, and despite the existence of a small support unit, it does not have a permanent secretariat. The assessment paper suggested the creation of a multi-year agenda and noted the need for appropriate and efficient supporting structures.

54. The consolidated assessment paper acknowledged that interaction with civil society stakeholders had greatly enriched the Global Forum process and recommended that interaction with civil society be improved. During each Global

[5] Global Forum on Migration and Development, "Background and objectives". Available from www.gfmd.org/en/process/background.

[6] Available from www.gfmd.org/documents/mauritius/consolidated_assessment_paper_final_draft_30_september_2012.pdf.

Forum meeting, "civil society days" precede the official government programme. Civil society organizations are excluded from most of the Global Forum meetings, except the "common space", which has been organized during the first morning of the meetings since 2010. Civil society organizations working on different issues relating to migration and development, such as remittances and the role of diasporas, participate in the civil society programme. However, human rights non-governmental organizations, unfortunately, are often not involved. The Special Rapporteur thus urges civil society organizations to have a more explicit human rights framing to their advocacy and activities at the Global Forum.

55. While recognizing that States wish to have some private, informal discussions at the Global Forum, the Special Rapporteur is of the opinion that civil society should have access to more of the Global Forum meetings, as this would bring different perspectives and greatly benefit the discussions.

56. While stating that consultations with international organizations, including those that are part of the Global Migration Group, have greatly benefited the Global Forum process, in particular through the provision of thematic expertise, the consolidated assessment paper concluded that the Global Migration Group, other international organizations and regional entities should not interfere with Global Forum structures and processes. Furthermore, it stated that interventions by international organizations should be limited and the agenda should be set by States and not international organizations or experts. The Special Rapporteur acknowledges that as the Global Forum is a States-led forum, it is appropriate that the agenda be set by States. However, by excluding the Global Migration Group and other organizations from the Global Forum processes, valuable expertise in terms of human rights and normative frameworks, which could greatly benefit the discussions at the Global Forum, is thus not taken into account.

57. The Special Rapporteur believes that there should be a closer link between the Global Forum on Migration and Development and the High-level Dialogue, particularly through the role and expertise of the Global Migration Group. If States decide to hold high-level dialogues more regularly, for instance every three years, the two years between dialogues could be used by States at the Global Forum and other international forums to prepare for the following High-level Dialogue.

### (b) International Organization for Migration

58. IOM is a large international organization with 151 member States, 12 observer States and more than 7,800 staff members in more than 470 locations. IOM is largely operational in its mandate, acting essentially as a service provider to States, with no legal protection mandate in its Constitution. Its purposes and functions, as set out in its Constitution, include the organized transfer of migrants and the provision of migration services related to recruitment, services for voluntary return and a forum for the exchange of views and practices.

59. As set out in its strategy document, the primary goal of IOM is to facilitate the orderly and humane management of international migration. IOM provides services as requested by States, inter alia, in relation to the assisted voluntary return of migrants. Assisted voluntary return programmes have been criticized for not being genuinely voluntary, particularly when offered to migrants kept in detention centres. The Special Rapporteur stresses the importance of ensuring that they are undertaken with full respect for the human rights of migrants. Furthermore, IOM involvement

in the construction and operation of detention centres for migrants is of great concern to the Special Rapporteur, who has already made his views clear on the utility of migration detention (see A/HRC/20/24).

60. IOM is also involved in other aspects of migration, such as programmes on migrants' health and anti-trafficking, and it has developed migrants' rights training programmes for stakeholders. As IOM is project-based and its work donor-driven, its agenda is largely decided by its member States. The Special Rapporteur has met with IOM staff, both at headquarters and in the field, who take the human rights of migrants very seriously and do good and important work in that regard. However, the mandate and funding of IOM pose structural problems with regard to fully adopting a human rights framework for its work: both would need to be revised if the organization is to become a key player in the promotion and protection of the human rights of migrants.

61. The fact that the mandate of IOM is not supportive of human rights is of concern for the whole United Nations system, as IOM is part of the Global Migration Group and the United Nations country teams in many countries and is often mistakenly believed, including by migrants themselves, to be a United Nations agency.

### 3. Governance at the regional level

62. The unprecedented level of international migration in recent years, coupled with the lack of a global framework on migration, has contributed to enhanced activity at the regional level, including migration-related agreements within regional organizations or economic communities. Another increasingly used instrument at the regional level are regional consultative processes on migration.

#### (a) Regional organizations: focus on the European Union

63. Economic communities all over the world have some form of agreement or intention on the free movement of people within their region. This includes the Economic Community of West African States, the Commonwealth of Independent States and the Common Market of the South (MERCOSUR). The European Union, with its 28 member States, has the most elaborate system of all the regional economic communities and thus provides one of the most developed examples of regional migration governance.

64. The Treaty of Rome provided the right to free movement of workers within the European Economic Community, thus recognizing the economic benefits of free movement. The European Union's expansion in 2004, including to Eastern Europe, proved that free movement is also possible for countries with different levels of economic development, enhancing the benefits of mobility for all concerned.

65. Since its beginnings, the European Union has expanded considerably, both in terms of number of member States and mandate. With the entry into force of the 1999 Treaty of Amsterdam, migration and asylum policies including the Schengen acquis (the creation of a common external border with free movement inside the border) were officially incorporated into the legal framework of the European Union.

66. The European Union makes a distinction between European Union nationals, who have freedom of movement inside the whole territory and are thus not considered migrants, and "third-country nationals". Several European Union

directives concerning third-country nationals have been adopted on such issues as high-skilled labour migration and family reunification, and a draft directive on seasonal workers is being negotiated. The European Union migration policies also have an external dimension through the Global Approach to Migration and Mobility.

67. Despite the high level of integration, the individual European Union member States continue to have the jurisdiction to decide on the number of migrants they wish to admit to their territory. The European Union thus provides an interesting example of how States' sovereignty can be maintained while at the same time engaging in significant joint governance processes in the field of migration. While there are serious issues that require improvement in the European Union, including in relation to border management and the human rights of migrants in an irregular situation,[7] European Union initiatives have led to some important advances, particularly for regular migrants.

68. While other regions have already implemented, to varying degrees, free movement zones, the European Union's free movement for citizens of European Union member States can serve as an illustrative example for other regional organizations in terms of exploring how to enhance free movement within their region.

### (b) Regional consultative processes[8]

69. Unlike the European Union, which adopts binding legislation and decisions with which its member States need to comply and whose implementation is monitored by the Court of Justice of the European Union, regional consultative processes provide forums for discreet informal and non-binding dialogue and information exchange on migration-related issues. Regional consultative processes bring together representatives of States, often with some international organizations as observers. They address a wide range of issues, such as migration and development, labour migration, the social integration of migrants, smuggling and trafficking, migration and health, and trade and migration, offering States a cooperation process that excludes creating new norms or formal commitments.

70. The first regional consultative process, the Intergovernmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia, was organized in 1985 and involved 17 countries. Other major regional consultative processes include the Budapest Process; the Puebla Process; the South American Conference on Migration; the Mediterranean Transit Migration Dialogue; the Bali Process; the Colombo Process; the Abu Dhabi Dialogue; the Western Mediterranean Forum; the Migration Dialogue for West Africa; the Migration Dialogue for Southern Africa; the Intergovernmental Asia-Pacific Consultations on Refugees, Displaced Persons and Migrants; and the Intergovernmental Authority on Development Regional Consultative Process on Migration.

71. Some of the regional consultative processes are driven by external actors, with funding coming from States of the global North, often channelled through IOM. IOM participates in most of the major regional consultative processes as a partner or

[7] Some of these questions are explored in the Special Rapporteur's report to the Human Rights Council on the management of the external borders of the European Union and its impact on the human rights of migrants (A/HRC/23/46).

[8] See www.iom.int/cms/en/sites/iom/home/what-we-do/regional-processes-1/rcps-by-region.html.

observer and provides secretariat services for many of the major processes. The International Centre for Migration Policy Development also provides secretariat services for some of the processes. United Nations entities, including UNODC, UNHCR and ILO, are observers in some of the processes.

72. The main purpose of the regional consultative processes is the coordination of migration, presenting a forum for States to share information, not regulation. They thus take place behind closed doors, with little involvement on the part of civil society. Governments exchange what they consider best practices, including the technological advances that they have been able to make and the processes that they have adopted, and develop forms of cooperation. Often this will include a transfer in technology or training of personnel. Regional consultative processes may sometimes contribute to elaborating bilateral, regional or trans-regional agreements. However, given the informal nature of these mechanisms, there is no detailed record of the proceedings, and accountability is therefore difficult to track. Regional consultative processes generally do not focus on human rights, although human rights are on the agenda of some of them, including the Puebla Process and the South American Conference on Migration.

73. Regional consultative processes provide the same type of informal governance as the Global Forum on Migration and Development, namely informal structures not intended to lead to any normative changes or institutional developments. This type of approach often does not embrace the complexity of migration issues and can lead to a dilution of normative standards and a lack of accountability, monitoring and oversight, thus potentially negatively affecting the human rights of migrants.

74. This is evidenced, inter alia, in the agenda of many regional consultative processes, which are heavily focused on measures to control migration through aggressive border enforcement, a preference for precarious circular migration schemes and the restriction of any reference to human rights to the lowest common denominator.

75. Regional consultative processes are often characterized by power asymmetries, whereby the most powerful countries, often destination States, dominate the discussions. Some are trans-regional, bringing together States from different geographical regions, whereby the funding, training and knowledge often come from outside the region. The involved States often have different levels of development and economic strength, thus creating an uneven level for their bargaining power.

76. There are significant overlaps between several regional consultative processes, and this has been deemed unsustainable from a political, financial and human resources perspective.[9] The overlaps create a risk of duplication and contradiction, thus requiring enhanced coordination between the different processes. The majority of them are not linked to each other, and they have different agendas. Consequently, making them come together as a whole seems unlikely. There have, however, been some efforts at coordination between the principal regional consultative processes,

[9] Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Global Approach to Migration and Mobility, 18 November 2011.

including global meetings of their Chairs and secretariats organized in collaboration with IOM.[10]

### 4. Bilateral migration initiatives

77. Bilateral migration governance is increasing and, in particular, has been playing an increasingly important role in the regulation of recruitment and employment of migrant workers between sending and receiving States, and regarding the return of irregularly staying migrants. Bilateral agreements cover such areas as visas, readmission, knowledge-sharing, labour migration, border management and rescue at sea. They are often entered into between neighbouring States but also between States from different regions. An example is the European Union's mobility partnerships, which comprise joint declarations, often with simultaneously negotiated visa facilitation and readmission agreements. As noted in the 2013 report of the Special Rapporteur to the Human Rights Council, readmission agreements — covering both nationals of the country of return and third-country nationals having used the country of return as a transit State — are sometimes used as a bargaining tool, are signed in exchange for visa facilitation or liberalization for nationals of the country of return, and often do not ensure respect for the human rights of migrants.

78. There has been a proliferation of actors involved in bilateral migration governance. As an example, bilateral agreements on the recruitment of migrant workers sometimes involve private agencies. States must monitor those agencies closely in order to ensure that they fully respect the human rights of the migrants concerned. The Special Rapporteur would like to remind States that all bilateral agreements must strictly uphold the human rights of migrants and that they must ensure transparency, monitoring of implementation and effective access to justice for the migrants.

79. Bilateral agreements may be useful additions to regional or global approaches, particularly for neighbouring countries where there is a high level of mobility. The Special Rapporteur notes the challenges in ensuring transparency and the human rights dimension of bilateral agreements and in monitoring their human rights impact, as they are forms of private agreement between States and subject to the aforementioned power asymmetries between negotiating States.

### 5. Governance at the national level

80. Migration policies are formulated mainly at the national level, despite migration being by definition transnational. Good governance at the national level is thus a basis for more effective cooperation at the regional and global levels. This can be achieved by establishing a coherent approach at the national level, addressing all stages of the migration process, coordinated across government and developed in widespread consultation with the private sector, civil society and migrants themselves.[11] Ministries responsible for, inter alia, health, education, employment, children and social policies should be fully involved in the elaboration of migration policies.

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[10] www.iom.int/cms/en/sites/iom/home/what-we-do/regional-processes-1/global-rcp-meetings.html.

[11] Global Commission on International Migration, "Migration in an interconnected world: new directions for action".

81. Governance at the local level is also important to keep in mind, as that is often where authorities have the most direct contact with migrants. Thus, local policies may be more evidence-based than policies at the national level. For instance, some local authorities provide universal access to health care for irregular migrants despite this not being the policy at the national level because they see the benefits for the local community in terms of reduced costs by providing preventive care, rather than emergency care only, and greater social cohesion.

82. While an efficient, well-trained and human rights- and gender-sensitive immigration enforcement corps is an important component of State authority, "firewalls" between public services (health care, education, housing, labour inspection, local police) and immigration enforcement (whereby the former would be instructed not to request immigration status information unless essential and the latter would not have access to the information collected by the former relating to immigration status) should be implemented in order to allow migrants to access rights without fear of being arrested, detained or deported. The concept of a "firewall" is not only in line with a human rights framework but also in the interest of States, from the point of view of, inter alia, public health and fighting crime.

83. In addition, fighting labour exploitation of migrants by sanctioning exploitative employers often seems to be a yet-unfulfilled State obligation, although it would contribute greatly in reducing the pull factor of irregular migration and diminish the power of smugglers over migrants.

### 6. Impact at the global level of regional and bilateral governance

84. Regional and bilateral migration governance may lead to global change by building trust among States. Issues discussed at the bilateral or regional level may then be brought to the global level, at the United Nations or the Global Forum on Migration and Development. The Global Forum has acknowledged regional consultative and similar processes and encouraged their participants to present best practices and policies to influence global discussions and to take forward and adapt insights gained from the processes.

85. At the same time that bilateral and regional processes may contribute to global migration governance, global governance may also improve regional and bilateral processes if States agree on global standards and practices and bring those to the regional or bilateral level.

86. There are several regional organizations in the world with some form of free movement for citizens of the organization's member States. It could be envisaged that at some point some of those initiatives could connect, thus expanding the free mobility area covered. However, there is an imperative need for a central human rights framework in all these processes.

## D. Need for better migration governance and a strengthened institutional framework

87. The reasons behind the lack of a comprehensive institutional framework for global migration governance are complex. Sending and receiving States often do not have a common understanding of the issues at stake despite the fact that, if governed well, they would all benefit from migration. Destination States often argue the need

to limit immigration due to economic interests, even though there are labour needs in their countries that remain unmet and often unrecognized. In addition, perceived security interests often trump States' human rights considerations despite the fact that the overwhelming majority of migrants, including those crossing borders irregularly, pose no security threat. The Special Rapporteur believes that some of the underlying reasons for States not wanting to engage more in global migration governance are due to political pressure at the national level and the populist anti-immigrant discourse which is increasingly present in countries all over the world.

88. Migration benefits not only States of origin, for example in terms of remittances and the transfer of social and cultural knowledge, but also States of destination, which often have labour shortages and rely on migrant workers, both high- and low-skilled, as well as in terms of cultural diversity and knowledge exchanges, among others. If States were to agree to cooperate more on migration governance, they would be able to maximize and better redistribute these benefits. Such cooperation would not preclude States from determining the number of labour migrants, as already noted in relation to the European Union's system.

89. Migration is one of the main manifestations of globalization, which cannot be managed unilaterally by national migration policies. International cooperation is necessary to achieve national policy goals. There is no doubt that all States will benefit from a strengthened framework on global migration governance. No State can, on its own, or even jointly with a few other States through bilateral or regional cooperation, discuss migration in a comprehensive way. The Special Rapporteur observes that States' reluctance to strengthened migration governance seems to be based on the misconception that this will limit their sovereignty.

90. States have the power to determine who enters and stays in their territory. More governance does not mean giving up this sovereignty. On the contrary, States would have more control if there was more migration governance. More governance simply means improving the coordination and cooperation between States, leading to better-governed migration that would better respect the human rights dimension, thus further protecting States from allegations of human rights abuses against migrants. As the scope and complexities of migration continue to grow, the alternative to more robust global migration governance is a highly unregulated system with a range of uncoordinated actors, including from the private sector. More migration governance would also assist States in combating the exploitation of migrants by, inter alia, traffickers, smugglers, recruitment agencies and unscrupulous employers.

91. The Special Rapporteur is of the view that sovereignty will be more limited by insufficient global migration governance, which will in fact facilitate the role of other actors, such as exploitative migrant smugglers and employers. Currently, migrants themselves, often with the help of migrant smugglers, are crossing borders regardless of State policies. They migrate irregularly owing to a lack of legal migration channels and largely in response to unrecognized needs in the labour market, as migrants are often willing to do the "dirty, difficult and dangerous" jobs that nationals will not at the exploitative wages that unscrupulous employers will offer. If States were to recognize their labour needs, including for low-skilled work, and open up more regular migration channels, this would lead to fewer irregular border crossings, less smuggling of migrants, less loss of life at borders, less labour

exploitation and fewer migrants' rights violations. States would still have the sovereignty to decide on the number of migrants they wish to admit. Global migration governance should thus be seen as reclaiming sovereignty, not ceding it.[12]

92. As stated by the European Commission, poorly managed migration has detrimental effects. Promoting effective migration governance is essential to maximise the positive and minimise the negative impacts of migration on development. In the absence of effective governance, the costs of migration may be significant.[13]

## E. Need to base the institutional framework inside the United Nations

93. The Special Rapporteur is concerned that migration dialogues often take place outside the United Nations and international human rights frameworks, with a focus on the economic developmental and political aspects of migration, without properly integrating human rights concerns. He is also concerned at the lack of accountability of the Global Forum on Migration Development and regional consultative processes due to the absence of detailed records of proceedings. While noting that the Global Forum and regional consultative processes may be useful forums for informal discussions between States, this is not sufficient to lead to any significant changes or improvements relating to global migration governance. He thus remains convinced that a strengthened institutional framework is needed in addition to these informal forums. The number of international migrants is increasing, and a growing number of vulnerable migrants are abused and exploited both in transit and destination countries. Furthermore, globalization is likely to increase the scale of international migration, which is already quite substantial with an estimate of more than 232 million international migrants in the world.

94. Greater involvement on the part of the United Nations in the global debate on migration seems difficult to achieve as long as the Global Forum on Migration and Development remains the leading international forum to discuss migration as an informal, non-binding, voluntary and government-led process focused on migration and development without giving proper attention to the human rights of migrants. Consequently, there is a need to bring the migration dialogue inside the United Nations framework. The United Nations plays an important role as a forum for international collaboration, with human rights as one of its pillars: it is capable of embracing the extreme complexity of migration movements in all their dimensions. Creating a new, United Nations-based institutional framework would not preclude regional or bilateral agreements, processes or organizations outside the United Nations from also dealing with migration.

[12] Kathleen Newland, "The governance of international migration: mechanisms, processes and institutions", paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration, September 2005.

[13] Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on maximizing the development impact of migration, 21 May 2013.

## F. Benefits of a human rights framework for global migration governance

95. Migration is multidimensional and is often conceptualized together with other aspects of globalization. However, those who are most affected by migration are the migrants themselves, who are human beings with inalienable human rights, and all States are obliged to respect the Universal Declaration of Human Rights and all the human rights treaties and international labour standards to which they are party. Thus, migration cannot be conceptualized without human rights, and any framework for migration governance must duly take into account the human rights of migrants.

96. The Global Commission on International Migration stated that the human rights component of the United Nations system should be used more effectively as a means of strengthening the legal and normative framework of international migration and ensuring the protection of migrant rights.[11] Furthermore, participants at the High-level Dialogue held in 2006 recognized that international migration, development and human rights were intrinsically interconnected (A/61/515).

97. Most States recognize refugees and the principle of non-refoulement. However, many migrants also have protection needs and cannot simply be dismissed as mere "economic migrants": they may be forced to migrate to escape from poverty, widespread violence, armed conflict, or the effects of climate change (see A/67/299). Some will be at risk of torture and other serious human rights violations if returned to their countries of origin. Many migrants migrate out of a complex, and often changing, mix of voluntary and forced reasons for movement.

98. Migrants often cannot access their rights in practice. In particular, irregular migrants are often afraid to demand access to their rights or to report abuses, as they fear detection, arrest, detention and deportation.

99. Protecting the human rights of migrants is beneficial for States, as it enables migrants to become more economically productive. As noted by the Global Migration Group in its statement dated 30 September 2010 on the human rights of migrants in an irregular situation, protecting the human rights of migrants is not only a legal obligation for States but also a matter of public interest and intrinsically linked to human development.

## G. Possible future models for global migration governance

100. Any future model for global migration governance should encompass several functions, including standard setting and normative oversight; capacity building and technical assistance; a platform for dialogue, collaboration and political facilitation; and the development of a knowledge base or capacity through data, indicators, and dissemination. These functions are currently carried out by a wide range of actors, both inside and outside the United Nations framework.

101. Different models have been proposed for future global migration governance. The Global Commission on International Migration took the view that a fundamental overhaul of the institutional architecture relating to international migration will be required in the longer term, both to bring together the disparate migration-related functions of existing United Nations and other agencies within a single organization, and to respond to the new and complex realities of international

migration. The Special Rapporteur has evaluated the options mentioned by the Global Commission, including creating a new agency, possibly by merging IOM and UNHCR; designating a lead agency, such as UNHCR or ILO; and bringing IOM into the United Nations system. He has also considered other measures to strengthen the current institutional framework.

### 1. New United Nations organization

102. Proposals have been made to establish a new United Nations organization with a specific mandate on international migration. Owing to the significant resources which would be required, this is not very likely to be accepted by States in the near future.

103. It has been suggested that, rather than creating a completely new agency, an agency could be created by merging IOM and UNHCR. The two organizations are already cooperating closely. However, a merger seems difficult to achieve, as long as UNHCR is a United Nations agency with a protection mandate based on the Convention relating to the Status of Refugees and IOM is not part of the United Nations system and has no protection mandate.

### 2. Expand the mandate of the Office of the United Nations High Commissioner for Refugees to cover all migrants

104. As an alternative to merging IOM and UNHCR, which seems difficult, an option that has been discussed is to expand the mandate of UNHCR to cover all migrants. The agency's mandate is currently limited to asylum seekers and refugees, stateless persons and internally displaced persons. Having one United Nations entity dealing with refugees, and none dealing exclusively with migrants, has resulted in the neglect of the rights of migrants, who are sometimes referred to as "mere" or "economic" migrants with no protection needs, even though this is often not the case.

105. While expanding the refugee agency's mandate would make sense substantially, it is to be feared that if this were to happen, migrants would not receive the same attention as refugees, as UNHCR has already built up expertise from working with refugees for more than 60 years and the normative basis for its work is the Convention relating to the Status of Refugees. Conversely, some might also fear that expanding the mandate of UNHCR would detract from its very important refugee protection mandate.

### 3. Creating a lead agency on migration

106. There is currently no lead agency on migration, either inside or outside the United Nations system. As long as the mandate of UNHCR does not cover all migrants, designating it as the lead agency for migration would not be advisable.

107. ILO has a constitutional mandate to protect migrant workers and is dedicating an increasing amount of its work to labour migration. While many persons cross borders to seek decent work and livelihoods, not all migrants are migrant workers, and migrants have rights and needs which expand beyond labour-related rights. This would make it difficult for ILO to have a holistic approach to migration beyond labour migration.

108. OHCHR has a robust mandate in relation to the human rights of migrants. However, the Office currently has limited human and financial resources to carry out this mandate.

### 4. Integrating the International Organization for Migration into the United Nations, with a revised mandate

109. The Global Commission on International Migration noted in its report that it would seem logical for IOM to become part of the United Nations system in order to maintain coherence and consistency within the multilateral system.

110. IOM already works very closely with the United Nations, including as a member of the Global Migration Group, and in many countries IOM is part of the United Nations country teams. Integrating IOM into the United Nations thus seems like an effective way to create a United Nations organization for migration.

111. Bringing IOM inside the United Nations could also lead to a more positive role taken by IOM, including holding the organization accountable for any human rights violations in which it may be involved in relation to, inter alia, the detention and return of migrants.

112. However, in order to include IOM in the United Nations, its mandate would need to be considerably revised, with a solid basis in the international human rights framework, and its entire staff, including in all field presences, would need to be properly trained in this regard. IOM would need to be given a legal protection mandate and guided by the core international human treaties, including the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, and the principles enshrined in the Charter of the United Nations would need to be integrated into its Constitution. It would also be important for IOM to gain the membership of key countries which are currently observer States.

113. Furthermore, IOM should ensure that in principle and in practice, it does not and will not carry out any activities which are contrary to international human rights law and to the principles of the Charter. It should therefore cease any activities in relation to the construction and operation of detention centres. Rather, the Special Rapporteur urges IOM to operationalize alternatives to detention (see A/HRC/20/24). IOM should also ensure that all its assisted voluntary return programmes are genuinely voluntary and carried out in strict compliance with human rights standards.

114. In addition, predictable funding should be made available to IOM, rather than project-driven funding provided by States for specific undertakings. Currently, more than 97 per cent of IOM funding is in the form of voluntary contributions for projects: thus, the donor States have a large role in determining the organization's work and priorities.

115. The Special Rapporteur believes that the proposal to bring IOM inside the United Nations system is worthy of further discussions, taking into consideration the issues raised above. However, any halfway solution that would amount to giving IOM the role of lead agency, either outside the United Nations system or inside it but without insisting on the development of a proper protection mandate, should be avoided. Furthermore, if IOM were to be integrated into the United Nations system and entrusted with a protection mandate, its work would still need to be coordinated

with that of all other relevant United Nations entities and agencies working on migration, such as OHCHR, UNHCR, ILO and UNICEF.

116. The IOM Constitution gives it a relatively limited mandate on migration, and a new United Nations organization for migration would need to become the lead organization on migration under a legal protection/human rights mandate. Dissolving IOM and moving its functions into this new, broader agency is thus another possibility which could be considered.

### 5. Measures to strengthen the current institutional framework

117. It is not realistic to think that agreement on a new institutional framework for migration inside the United Nations will be reached any time soon. In the meantime, there is a need to look at measures to strengthen the current institutional framework. This could be achieved, inter alia, by holding more frequent high-level dialogues. The draft resolution of the Second Committee of the General Assembly in 2012 provided that a high-level dialogue should be held every three years. Unfortunately that proposal was not included in the final text of the resolution.

118. As proposed in the OHCHR report entitled "Migration and human rights: improving human rights-based governance of international migration", the establishment within the United Nations of a standing platform on the human rights of migrants would enable systematic interaction between all relevant stakeholders (including Member States, Global Migration Group agencies, other international and regional organizations, civil society and migrants themselves) on a broad range of cross-cutting human rights and migration issues.

119. Furthermore, the work of the Global Migration Group should be further streamlined and its human rights framework strengthened. The mandate of OHCHR and its operational expertise on migration and human rights in this respect is crucial.

120. There have also been proposals to bring the Global Forum on Migration and Development inside the United Nations. This does not seem to be very realistic in the near future. The Special Rapporteur believes that, if a high-level dialogue could be held more frequently, for instance every three years, the Global Forum could complement this United Nations process and provide an opportunity for States to discuss informally outside the United Nations setting.

## IV. Conclusions and recommendations

### A. Conclusions

121. **Migration governance is becoming increasingly informal, ad hoc, non-binding and State-led, falling largely outside the United Nations framework in such forums as the Global Forum on Migration and Development and regional consultative processes. This leads to a lack of accountability, monitoring and oversight and the absence of a relationship with the formal normative monitoring mechanisms established within the United Nations.**

122. **There is thus a need to enhance the human rights dimension of global migration governance, including in terms of accountability, and to bring it back to the United Nations, including by establishing a United Nations-based**

**institutional framework on migration. There has been considerable movement and interest shown over the past decade in terms of the two High-level Dialogues on International Migration and Development, the creation of the Global Forum on Migration and Development and the Global Migration Group and recent growth in IOM membership, as well as the development of regional initiatives, both through regional organizations and regional consultative processes. Thus, there seems to be some recognition of the need for more migration governance.**

123. **States can commit to more migration governance while at the same time maintaining their sovereignty in relation to deciding who enters and stays in their territory.**

124. **Better global migration governance would be advantageous for all States because they cannot deal with a global phenomenon unilaterally, bilaterally or even regionally only. Enhanced governance would allow for better responsibility-sharing on the part of States associated with migration. While the Global Forum on Migration and Development provides a useful platform for informal discussions between States, it should not be seen as a substitute for discussions about migration in the United Nations. More frequent high-level dialogues could also lead to closer linkages and synergies between discussions within and those outside the United Nations.**

125. **The growing number of regional consultative processes can be trust-building exercises but can also lead to duplication and contradictions. While bilateral and regional cooperation, including through such processes, regional organizations and bilateral agreements, may contribute to the coherence of global migration governance, these initiatives must fully take into consideration respect for the human rights of migrants and, in this regard, should be transparent, with effective monitoring and accountability mechanisms.**

126. **Migrants should always be seen first and foremost as human beings with inherent human rights, rather than agents for development. In this regard, a human rights framework for global migration governance is needed. Only when conceived of in terms of human rights will migration be able to fulfil its potential as an enabler of human development. The universal human rights framework must therefore guide all development cooperation and programming in all parts of the United Nations system relevant to migration.**

## B. Recommendations

### 1. Recommendations to States

127. **All States should establish human rights-based, coherent and comprehensive national migration policies. These policies should address the "pull" factors for irregular migration, namely the unrecognized need for migrant labour in destination States, including for low-skilled workers, and the corresponding need to open up a greater number of regular migration channels, which would lead to fewer instances of irregular migration, less smuggling of migrants, less exploitation of irregular migrants and less loss of life. In this respect, States must ensure that "irregular employers" are sanctioned, labour exploitation is punished and migrants, including those in an irregular situation,**

**have access to national courts and tribunals, which should effectively apply the international human rights treaties in providing appropriate redress. States should implement a "firewall" between immigration enforcement and public services and improve data collection and indicators in all areas relevant to migration in order to make informed policy decisions.**

128. **States must ensure that bilateral agreements related to migrants, and regional and trans-regional cooperation mechanisms, such as regional consultative processes, are transparent, guarantee the human rights of migrants and ensure accountability.**

129. **States should recognize the need for a stronger human rights-based institutional framework for migration at the United Nations. This could, in turn, have a positive effect on informal migration governance outside the United Nations, including the Global Forum on Migration and Development and regional consultative processes. In this respect, the Special Rapporteur urges all United Nations Member States to consider the possibility of creating a new organization with a specific mandate on international migration. This could be achieved, inter alia, by bringing IOM into the United Nations system. However, the Special Rapporteur notes that this would require that IOM be given a revised mandate that should include at its core the protection of the human rights of all migrants. The new "IOM-based" agency should also be provided with adequate resources that are not project-driven only.**

130. **States should consider ratifying all the core United Nations human rights treaties that they have not yet ratified, including the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, as well as other relevant treaties, including ILO conventions, the Convention relating to the Status of Refugees and the Convention on the Reduction of Statelessness.**

131. **States should ensure that the human rights of migrants are included in the post-2015 development agenda.**

**(a) Recommendations in relation to the High-level Dialogue on International Migration**

132. **The High-level Dialogue on International Migration to be held in 2013 is an important moment to reflect on the mainstreaming of human rights into all aspects of the migration debate.**

133. **States should consider holding more frequent high-level dialogues, for instance every three years, which should be interactive and action-oriented, each with a rights-based negotiated outcome document.**

134. **Human rights must be a cross-cutting issue that informs all discussions at the High-level Dialogue, and States should consider raising the following issues:**

**(a) Decriminalization of irregular entry and stay, which should never be considered criminal offences;**

**(b) The move away from detention as a tool in addressing irregular migration and the development of alternatives to detention;**

**(c) Measures to ensure awareness-raising on the human rights of migrants;**

(d) **Measures to combat xenophobia and xenophobic violence against migrants;**

(e) **Measures to ensure the effective protection of the human rights of children in States of transit and destination;**

(f) **Measures to ensure the enjoyment of all economic, social and cultural rights, including the right to education, health, social security and adequate housing and labour rights, for all migrants, including irregular migrants;**

(g) **Measures to ensure the human rights of migrants at borders, both at entry and during expulsion procedures;**

(h) **Measures to guarantee that migrants have effective access to recourse to independent institutions with regard to all the human rights violations that they face.**

**(b) Recommendations in relation to the Global Forum on Migration and Development**

135. **States should define more concrete outcomes of the meetings of the Global Forum on Migration and Development and, in this respect, consider adopting a formal outcome document at each meeting and establish a mechanism for follow-up and monitoring of the implementation of the Global Forum's recommendations.**

136. **States should consider enhancing civil society participation at the Global Forum.**

137. **The Global Forum should focus more on human rights, with dedicated round tables on relevant human rights issues, including the rights of migrants in an irregular situation, and mainstream the human rights of migrants in all its work.**

138. **The Global Forum should also consider discussing topics related to migration in general, not necessarily seen from the development perspective.**

139. **The Global Forum should rely more on the Global Migration Group (including OHCHR) expertise, and the United Nations human rights mechanisms should be invited to be part of the Global Forum's agenda on a regular basis.**

**2. Recommendations to the Human Rights Council**

140. **The Special Rapporteur urges the Human Rights Council to mainstream the human rights of migrants in all its work, whenever relevant, and deal with the human rights of migrants in its annual panel discussions on, inter alia, the rights of the child and women's rights.**

141. **The Human Rights Council should consider holding an annual panel discussion on the human rights of migrants, with a different thematic focus each year.**

**3. Recommendations to the Secretary-General**

142. **The Special Rapporteur urges the Secretary-General to show a clear vision and strong leadership on migration and advance the migration agenda at**

**the United Nations, giving it more visibility and ensuring the adoption of a human rights framework for migration inside the United Nations system.**

143. **The Secretary-General should strive to strengthen the Global Migration Group through his leadership and guidance, including the Group's role in relation to the human rights of migrants.**